

MISSISSIPPI LAW JOURNAL

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INTRODUCTION: ANOTHER BRICK IN THE WALL

Have you ever wondered whether you are related to a famous historical figure? Do you have questions about your ancestral lineage or family tree? Would you like to know if you are at risk for a serious disease? As advertised, genetic testing holds the key to unlocking those questions. From mild curiosities to very sober considerations, more Americans have taken steps to crack open their genetic codes and obtain information on everything from global origins to drug interactions and inherited illness mutations.¹ The idiosyncrasies and unique characteristics revealed by these tests lend more validation to the notion that we are more than just another brick in the wall.

Until recently, this need-to-know consumer attitude largely remained an untapped corner of the genetic marketplace. The staple genetic tests—paternity and forensic DNA testing²—dominated the field and occasionally garnered the interest of the American public.³ A few health care providers began to shine some light on this unused corner of the marketplace by using genetic tests to offer their patients insight into current or future illnesses and even discover potential maladies awaiting unborn

¹ See 23ANDME, <https://www.23andme.com> (last visited Jan. 2, 2012) [hereinafter 23ANDME].

² Forensic genetic testing is used in criminal cases to identify offenders and victims based on DNA evidence. MICHAEL NEWTON, THE ENCYCLOPEDIA OF HIGH-TECH CRIME AND CRIME-FIGHTING: FROM AIRPORT SECURITY TO THE ZYX COMPUTER VIRUS 92 (2004).

³ The cases of O.J. Simpson and Anna Nicole Smith serve as prime examples. The genetic issues presented in both the Simpson case (whether O.J. Simpson’s DNA was left at the crime scene by O.J. or planted by scheming LAPD detectives) and the Smith case (the paternity of her child revealed after her death) captured the nation’s attention. Ironically, Simpson and Smith crossed paths when it was rumored that Simpson was among the possible candidates who could have fathered Smith’s child. See Richard Johnson, Paula Froelich & Corynne Steindler, *O.J. A Smith Dad Candidate*, N.Y. POST, Mar. 7, 2007, http://www.nypost.com/p/pagesix/item_CPsHhDua3ibqh4CW6ym2gP.

children.⁴ What was once the exclusive province of the legal system (paternity, forensic DNA) and health care providers, however, has now become as easy as buying a book on Amazon.com.

Indeed, the availability of direct-to-consumer genetic testing has skyrocketed in comparison to its non-existence only a decade ago. No longer in its infancy, these commercially available genetic tests offer a wide range of services to consumers beyond disease prediction, including intelligence measurements,⁵ compatible mate matching,⁶ and “DNA Tribe” identification, a growing number of individuals send their DNA samples to these companies with little understanding of the scope of their consent or whether they maintain any rights or interest in their DNA.⁷ Moreover, the accuracy and reliability of such services largely remains untested.⁸

To be sure, the amenities these companies offer—to know the unknown and be empowered with one’s own crystal ball—are appealing. Yet, in addition to considering the easy questions at the outset of this Article, I submit that most consumers do not consider that these companies are first-and-foremost, for-profit enterprises that essentially go unregulated by law or medical guidelines. In order to stay in business, direct-to-consumer genetic testing outfits must continuously attract more customers, often by offering flashy services.⁹ Profits and survivability dictate the need for mass appeal, and to achieve a consumer attitude that seeks

⁴ Jonathan M. Gitlin, *Direct to Consumer Genetic Testing Raises Concerns*, ARS TECHNICA, Apr. 4, 2008, <http://arstechnica.com/science/news/2008/04/direct-to-consumer-genetic-testing-raises-concerns.ars>.

⁵ See 23ANDME, *supra* note 1.

⁶ Catherine Holahan, *So I Married an Avatar*, BUSINESSWEEK (Feb. 14, 2008, 4:38 PM), http://www.businessweek.com/technology/content/feb2008/tc20080214_131079.htm

⁷ See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990).

⁸ Judy Foreman, *You Can Buy a DNA Test, But Beware*, BOS. GLOBE, Aug. 7, 2006, http://www.boston.com/news/science/articles/2006/08/07/you_can_buy_a_dna_test_but_beware/ (noting the law regulates the laboratories doing the testing, but doesn’t address the clinical validity of the tests themselves).

⁹ For example, 23andMe offers services purporting to allow you to “grow your family tree,” “explore the world of your early ancestors,” *Ancestry*, 23ANDME, <https://www.23andme.com/ancestry> (last visited Jan. 2, 2012), and “be on the lookout now” for health risks. *Health*, 23ANDME, <https://www.23andme.com/health> (last visited Jan. 2, 2012).

answers through DNA, the costs have become more affordable. Affordability essentially gives rise to a “Genetic Groupon”¹⁰ of sorts—easily accessible by signing up online and sending in a swab of your own DNA on a Q-tip.¹¹

Perhaps lost in the glitz and glamour of obtaining a personalized genetic report card is the larger process that engulfs the purchased product and generally operates without the consumer’s full knowledge or cognizance. This intricate process runs much like any other commercial transaction: attractive advertising, the purchase of a product, delivery of results, online consumer account activity, and the sales-related research.¹² There is nothing inherently suspect with this—a process that is axiomatic to our almost ubiquitous free market system.¹³ After all, if someone wanted to buy a book titled *To Test or Not To Test: A Guide to Genetic Screening and Risk*¹⁴ on Amazon, the method would be much the same: advertising, purchase, delivery, and the use of sales information for market research.¹⁵

The difference, however, is that paying for a genetic test is more than merely buying your body’s instruction manual. It is a deeply personal chronicle of who a person is and who he or she might become. But is it an accurate biography or a work of fiction?¹⁶ Because of this, genetic profiteering runs the risk of generating genetic *misinformation*. Does the provider equip the consumer with enough information to discern whether results are

¹⁰ Groupon is a portmanteau derived from “group coupon” and also a website which sells discounted gift certificates, emulating a group rate discount. Here it is used to describe the boom in business created by newly affordable at home genetic testing kits.

¹¹ See, e.g., THE GENETICS AND PUBLIC POLICY CENTER, DTC GENETIC TESTING COMPANIES (2010), <http://www.dnapolicy.org/resources/AlphabetizedDTCGeneticTestingCompanies.pdf>.

¹² See *Help: Privacy Notice*, AMAZON.COM, http://www.amazon.com/gp/help/customer/display.html/ref=hp_468496_conditions?nodeId=468496&#gather (last visited Jan. 2, 2012).

¹³ *Id.*

¹⁴ DORIS TEICHLER ZALLEN, *TO TEST OR NOT TO TEST: A GUIDE TO GENETIC SCREENING AND RISK* (2008).

¹⁵ See AMAZON.COM, *supra* note 12 (“We use the information that you provide for such purposes as responding to your requests, customizing future shopping for you, improving our stores, and communicating with you.”).

¹⁶ See, e.g., Jason Kincaid, *23andMe Sends Wrong DNA Test Results to 96 Customers*, TECHCRUNCH, June 7, 2010, <http://techcrunch.com/2010/06/07/23andme-sends-wrong-dna-test-results-to-96-customers/>.

uncertain or inevitable?¹⁷ When the news may impact the consumer's quality of life (such as the decision to have children or have preventative surgery), does the provider offer genetic counseling or steer the consumer to those who can offer those services?¹⁸

Although primary, these immediate considerations do not include issues regarding the downstream uses of the genetic information. In addition to collecting DNA samples and processing the biological material to generate an end product for the consumer, companies may also collect additional information that includes self-reported data that the consumer provides, such as health, ethnic, and other personal facts.¹⁹ The provider may also keep records of a person's usage patterns of the company's website.²⁰ Third parties may also receive some of the information—ostensibly stripped of identifying indicators—to use for undisclosed research purposes.²¹ Of course, each company has

¹⁷ See Gaia Bernstein, *Direct-to-Consumer Genetic Testing: Gatekeeping the Production of Genetic Information*, 79 UMKC L. REV. 283, 291 (2010) (pointing out that a positive test result may be given more weight than is merited).

¹⁸ For example, 23andMe's "Terms of Service" expressly state:

Once you obtain your Genetic Information, the knowledge is irrevocable. You should not assume that any information we may be able to provide to you, whether now or as genetic research advances, will be welcome or positive. You should also understand that as research advances, in order for you to assess the meaning of your DNA in the context of such advances, you may need to obtain further services from 23andMe or from your physician or other health care provider. . . . You may learn information about yourself that you do not anticipate. This information may evoke strong emotions and has the potential to alter your life and worldview. You may discover things about yourself that trouble you and that you may not have the ability to control or change (e.g., your father is not genetically your father, surprising facts related to your ancestry, or that someone with your genotype may have a higher than average chance of developing a specific condition or disease). These outcomes could have social, legal, or economic implications.

Terms of Service, 23ANDME, <https://www.23andme.com/about/tos/> (last visited Jan. 2, 2012).

¹⁹ See, e.g., *Consent Document*, 23ANDME, <https://www.23andme.com/about/consent/> (last visited Jan. 2, 2012) ("By participating in this study, you are agreeing to allow us to use your genetic data, survey responses and any other non-identifying data for research on genetic markers associated with traits, disease and other physical conditions.").

²⁰ *Id.*

²¹ *Id.*

a detailed consent page with numerous conditions and clauses that legally protect the company. But who protects the consumer?

As the industry currently stands, Genetic Groupons over promise and under deliver. In this Article, I will discuss the ethical implications of marketing DNA to the masses and the need for balanced regulatory oversight. First, I follow the evolution of genetic services, from the educational and medical mainstays to the current regulatory scheme that applies to them. Second, this Article considers the predictive and predatory capabilities of “DIY DNA,”²² where customers collect and mail in their own DNA swabs for various services. In this Section, I consider the seemingly incongruous dynamic between the consumer’s interests in knowledge, convenience, privacy, and accuracy and the corporate interest in profit and productivity. In the final Section, I discuss the regulatory scheme that must be considered with Genetic Groupons. Although currently untouched by the FDA and ignored by the FTC, there is room for regulation that encourages innovation, protects privacy, delivers scientifically defensible results, and of course, allows profit. Genetic information may seem like numbers on a license plate, but as the industry grows so must the education and safeguards that accompany it. When new technology develops at an astonishing pace, the law is often slow (and even ill-equipped) to respond. But when that technology involves private genetic information, the law cannot afford to be either lethargic or ignorant.

I. COMFORTABLY NUMB: ACCEPTING THE GENETIC REVOLUTION

Going off to college promises a host of new experiences— independence, ramen noodles, and communal bathrooms are classic elements of this coming of age event. Admittedly, late night fast food runs and drinking too much also come with the territory for many coeds. With this newfound independence and responsibility, however, come the realities of autonomy: dealing with roommates, splitting bills, and sharing a space built for one with three other people. In some ways, college demands that you

²² Marcus Wohlsen, *Do It Yourself DNA: Amateurs Trying Genetic Engineering At Home*, HUFFINGTON POST (Dec. 25, 2008, 9:38 PM), http://www.huffingtonpost.com/2008/12/25/do-it-yourself-dna-amateu_n_153489.html.

relinquish some personal space—in addition to fees, tuition, room and board—for this degree-fetching experience. But what if students also have to provide a DNA sample when registering? Recently, the University of California, Berkeley asked its incoming freshmen to submit their DNA (in addition to tuition, room and board) so that the school could analyze those samples for three genes that regulate alcohol, lactose, and folate metabolism.²³

The unusual request was made as part of a “mass genetic testing” project engineered by Berkeley scientists.²⁴ The project targeted those specific genes not to determine health risks, but to use “nutritional genomics” to help students (in a somewhat Orwellian fashion) “lead healthier lives by drinking less, avoiding dairy products or eating more leafy green vegetables.”²⁵ Framed as a “common intellectual experience” that could be shared by new students, the testing of the incoming 2010 freshman class—termed “Bring Your Genes to Cal”—was both voluntary and confidential, and students under the age of 18 were required to obtain parental consent before submitting their DNA.²⁶ The results would then be delivered through a campus-wide lecture to discuss the three genetic markers.²⁷ Berkeley sweetened the testing by creating a contest whereby students could “submit creative entries on the theme” for the opportunity to win genetic testing from 23andMe.²⁸

Despite the promise of confidential results reporting and the use of informed consent documents, the project received more criticism than praise.²⁹ Some assailed the testing for its lack of

²³ Tamar Lewin, *College Bound, DNA Swabs in Hand*, N.Y. TIMES, May 19, 2010, at A14, available at <http://www.nytimes.com/2010/05/19/education/19dna.html?sq=College%20bound,%20dna%20swab%20in%20hand&st=cse&adxnnl=1&scp=1&adxnnlx=1305832168-20zR3CkIu9b3h2APlvG/1Q>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* The DNA testing offered at Berkeley was part of a program—On the Same Page—which normally provided incoming freshmen and transfer students with the same book or DVD once they matriculated so that it could be discussed after the start of classes in the fall. Robert Sanders, *UC Berkeley Alters DNA Testing Program*, BERKELEY NEWS CTR. (Aug. 12, 2010), http://newscenter.berkeley.edu/2010/08/12/dna_change/.

²⁷ Lewin, *supra* note 23.

²⁸ *Id.*

²⁹ *Id.*

counseling support subsequent to receiving results.³⁰ Berkeley professors attempted to mitigate the rising discontent by labeling the testing to be a “relatively harmless” endeavor, but critics posited that all genetic knowledge carries risk.³¹ Indeed, one bioethicist noted that testing for the presence of an alcohol tolerance gene is anything but innocuous information: “What if someone tests negative, and they don’t have the marker, so they think that means they can drink more?”³²

Amid these concerns, roughly 600 of the 5000 incoming students offered up a saliva sample before the California Department of Public Health effectively shut the project down.³³ The CDPH determined that if students were to receive access to their own test results, the “academic exercise” must comply with laws that required “accuracy and quality of diagnostic tests used in providing medical care to patients.”³⁴ At CDPH’s request, Berkeley made the decision to limit the research to a macro-analysis and not provide individual results to the students.³⁵ The university still held its discussion of personalized medicine in the fall of 2010.³⁶ Not surprisingly, the project’s organizers focused the program “on the politics of genetic testing and whether individuals, rather than physicians and public agencies, ultimately control their own genetic information”³⁷

Whether this brand of personalized medicine/vulnerability assessment will be attempted at other universities remains unknown. It certainly would have given students some common ground as the largest mass direct-to-consumer genetics testing endeavor. But Berkeley’s concession might best be summed up by

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Sanders, *supra* note 26.

³⁴ *Id.* The CDPH pointed to the federal Clinical Laboratory Improvement Amendments (CLIA) and the California Business and Professions Code, both of which dictate that genetic testing performed in medical diagnostic laboratories be certified for accuracy and reliability. *Id.*

³⁵ *Id.*

³⁶ See *Events, ON THE SAME PAGE*, <http://onthesamepage.berkeley.edu/archive/2010-genes/events.php> (last visited Jan. 2, 2012). A video of one of the events, a lecture by Professor Jasper Rine, is also available. See *Looking for the Good News in Your Genome*, YOUTUBE (Sept. 18, 2010), http://www.youtube.com/watch?v=jycPMwbZwUw&feature=youtube_gdata_player.

³⁷ Sanders, *supra* note 26.

its website's candor: "Keep in mind that technology can advance faster than cultures respond."³⁸ Despite the project's rapid retreat under fire, it signifies a wider genetic liberation front. Opponents worry, among other things, about the erosion of privacy and the need for reliability and counseling with such programs.³⁹ Proponents would say that this is merely the logical extension of the work begun centuries ago.⁴⁰ Whether logic alone justifies such an extension and whether progress should be tempered by ethical considerations are whole other matters entirely.

A. The Early Years: From Peas to Genes

What is the risk of mainstreaming our genetic information? Although it seems that we break new genetic ground frequently, the science itself is well past its infancy stage. From Gregor Mendel's work in pea plant hybridization in the 1860s to Watson and Crick's discovery of the double-helix structure of the DNA molecule in 1953, the building blocks of life have spawned a vast array of research.⁴¹ While the more familiar applications of genetics (i.e., those featured by the news media and in popular culture) include paternity testing and forensic DNA used in criminal investigations,⁴² the field of genetics is robust and varied. Originally a discipline that focused on inheritance, genetics has now evolved to encompass routine applications such as human health research and disease epidemiology.⁴³ Genetics also

³⁸ *Frequently Asked Questions*, ON THE SAME PAGE, <http://onthesamepage.berkeley.edu/archive/2010-genes/faq.php> (last visited Jan. 2, 2012).

³⁹ Larry Gordon, *U.C. Berkeley Adjusts Freshman Orientation's Gene-Testing Program*, L.A. TIMES (Aug. 13, 2010), <http://articles.latimes.com/2010/aug/13/local/la-me-dna-20100813>; Sanders, *supra* note 26.

⁴⁰ See Asad Ramzanali, Op-Ed., *Don't Attack UC Berkeley's Pursuit of Science*, DAILY BRUIN (May 26, 2010, 9:00PM), <http://www.dailybruin.com/index.php/article/2010/05/dont-attack-uc-berkeleys-pursuit-science>.

⁴¹ James Watson & Frederick Crick, *A Structure for Deoxyribose Nucleic Acid*, 171 NATURE 737-38 (1953), available at <http://www.nature.com/nature/dna50/watsoncrick.pdf>.

⁴² See Jessica D. Gabel, *Probable Cause From Probable Bonds: A Genetic Tattle Tale Based on Familial DNA*, 21 HASTINGS WOMEN'S L.J. 3, 5 (2010) (discussing the rising popularity of DNA, from forensic analysis and paternity testing to popular television shows).

⁴³ AN INTRODUCTION TO GENETIC EPIDEMIOLOGY 5-6 (Lyle J. Palmer et al. eds., 2011).

encompasses subspecialties such as pharmacogenetics, population genetics, and migration pattern analysis.⁴⁴

Consequently, it is no wonder that science has been enamored with our genetic underpinnings for decades. The questions over what makes us tick resound on more than just a molecular level. It is an innate human condition to probe our individual origins and our personal peculiarities.⁴⁵ While the answers are often found in our cultural and historical records, they also exist in our genetic fiber, and scientists have long attempted to connect the dots biologically.⁴⁶ In 2003, the Human Genome Project (HGP) completed the map of the entire genome.⁴⁷ Launched in 1990, the U.S. Department of Energy and the National Human Genome Research Institute (part of the National Institutes of Health) coordinated the HGP along with the United Kingdom's Wellcome Trust and other international contributors.⁴⁸ "The international effort to sequence the [human genome's] 3 billion DNA letters . . . [constituted] one the most ambitious scientific undertakings of all time, even compared to splitting the atom or going to the moon."⁴⁹ Whether or not that claim holds up, the HGP's accomplishments are undeniable: identification of *all* the nearly 30,000 genes in human DNA.⁵⁰

Although its primary objective has been met, the HGP's work is ongoing and uncovering new corridors at each turn.⁵¹ Scientists hewed the new genomic data at an astonishing pace. For example, when the Human Genome Project began in 1990, scientists had

⁴⁴ QUALITY ISSUES IN CLINICAL GENETIC SERVICES 206 (Ulf Kristoffersson et al. eds., 2010).

⁴⁵ Tudor Parfitt & Yulia Egorova, GENETICS, MASS MEDIA AND IDENTITY: A CASE STUDY OF GENETIC RESEARCH ON THE LEMBA AND BENE ISRAEL 17 (2006).

⁴⁶ *Id.*

⁴⁷ *International Consortium Completes Human Genome Project*, HUM. GENOME PROJECT INFO. (Apr. 14, 2003), http://www.ornl.gov/sci/techresources/Human_Genome/project/50yr/press4_2003.shtml.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See generally HUM. GENOME PROJECT INFO., http://www.ornl.gov/sci/techresources/Human_Genome/home.shtml (last visited Jan. 2, 2012).

⁵¹ See *The Science Behind the Human Genome Project: Basic Genetics, Genome Draft Sequence, and Post-Genome Science*, HUM. GENOME PROJECT INFO., http://www.ornl.gov/sci/techresources/Human_Genome/project/info.shtml#posthgp (last visited Jan. 2, 2012) (describing the new challenge as being to use the new "reservoir of data to explore how DNA and proteins work with each other").

only been able to isolate about 100 human disease genes.⁵² Today, researchers have identified more than 4000 diseases that are caused by genetic variants.⁵³ Because what can best be described as a Genetic Revolution brought about such powerful information for individuals, families, and society at large, the impact of the Human Genome Project transcends laboratory analysis. In respect of the enormity of their responsibility, the HGP researchers took care to also study the impact that mapping our entire genome might have beyond its scientific significance.⁵⁴

Under the guidance—and perhaps insistence—of Dr. Watson (yes, the Watson of Watson and Crick fame), the HGP broke new ground by dedicating a sizeable chunk of its budget for research regarding the ethical, legal, and social implications (ELSI) of this work.⁵⁵ Both the NHGRI and DOE each committed “3 to 5 percent of their genome budgets to study how the exponential increase in knowledge about human genetic make-up may affect individuals, institutions and society.”⁵⁶ The research included more than just impact studies and anecdotal statistics. ELSI research also developed model legislation that would prohibit discrimination based on genetic information.⁵⁷ From that, more than forty states and the federal government have passed genetic non-discrimination bills.⁵⁸

⁵² *International Consortium Completes Human Genome Project: All Goals Achieved; New Vision for Genome Research Unveiled*, NAT'L HUM. GENOME RES. INST. (Apr. 14, 2003), <http://www.genome.gov/11006929>.

⁵³ *About Genelink Biosciences*, GENELINK BIOSCIENCES, <http://genelinkbio.com/about/> (last visited Jan. 2, 2012).

⁵⁴ *See Ethical, Legal, and Social Issues*, HUM. GENOME PROJECT INFO., http://www.ornl.gov/sci/techresources/Human_Genome/elsi/elsi.shtml (last visited Jan. 2, 2012).

⁵⁵ *Id.*

⁵⁶ NAT'L HUM. GENOME RES. INST., *supra* note 52.

⁵⁷ *Breaking News: GINA Becomes Law May 2008*, HUM. GENOME PROJECT INFO., http://www.ornl.gov/sci/techresources/Human_Genome/elsi/legislat.shtml (last visited Jan. 2, 2012).

⁵⁸ Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000 (2008); ALA. CODE §§ 27-53-1 to -4 (1997); GA. CODE ANN. § 33-54-1 to -8 (1995). For a comprehensive listing of states which have enacted anti-discrimination statutes, see *Genetics and Health Insurance State Anti-Discrimination Laws*, NAT'L CONF. OF ST. LEGISLATURES (2008), <http://www.ncsl.org/default.aspx?tabid=14374>.

ELSI also created a legal training program on the fundamentals of genetics for over 3000 judges.⁵⁹ In addition to the legislative and legal efforts, ELSI reached out to a wider research community to include minority and other groups that might receive increased scrutiny from the revelations brought about by the genetic revolution.⁶⁰ The HGP's innovative approach to ethical, legal, and social implications has been employed in other research projects,⁶¹ but the adoption of such platforms like ELSI mostly occurs with respect to research housed in medical and educational institutions.⁶²

B. Invasion of the Body Scrappers

While mapping the entirety of the human genome was a multi-billion dollar project,⁶³ the financial considerations in genetic research are not one-sided. As researchers continue work on deciphering the human code, the focus inevitably shifts to disease study and gene therapy for those conditions.⁶⁴ In order to foster the understanding necessary to develop treatments and cures for these conditions, it becomes necessary to isolate the specific genes connected with the diseases.⁶⁵ The routine procedures of battle—whether military or medical—demand that one knows as much as possible about the enemy.⁶⁶ In order to isolate those genes, scientists must seek samples for study; samples originate from human research subjects, many of whom either have developed or could develop the specific disorder.⁶⁷

Of course, the use of such biological materials is not without controversy, particularly as it applies to questions of ownership

⁵⁹ Francis S. Collins et al., *The Human Genome Project: Lessons From Large-Scale Biology*, 300 SCI. 286, 289 (2003).

⁶⁰ *Id.*

⁶¹ *Id.* at 289-90.

⁶² *Id.*

⁶³ *Human Genome Project Budget*, HUM. GENOME PROJECT INFO., http://www.ornl.gov/sci/techresources/Human_Genome/project/budget.shtml (last visited Jan. 2, 2012).

⁶⁴ Collins, *supra* note 59, at 290.

⁶⁵ TIMOTHY M. COX & JOHN SINCLAIR, *MOLECULAR BIOLOGY IN MEDICINE* 98 (1997).

⁶⁶ *Id.*

⁶⁷ *Id.*

and big profits.⁶⁸ Sourcing treatments from human tissue samples has been a routine research field for several decades.⁶⁹ Coupled with the gene sequencing capabilities generated by the HGP, it was only a matter of time before the two concepts merged.⁷⁰ As a result, thousands of patients volunteer to participate in clinical trials and treatments in any given year.⁷¹ While many of these trials involve medications, medical devices, or both, a growing number of trials involve passive participation, whereby biological samples are taken and used for testing purposes and to extrapolate valuable data.⁷² The road from human body to Petri dish varies from person to person, and the sample may come from leftover or unused tissue associated with a routine surgery⁷³ or it could be tissue specifically designated for tissue banking,⁷⁴ (additional tissue that the patient agreed to be removed for research purposes⁷⁵), but the destination—hospital, university or research institution—generally remains the same.⁷⁶

By its very nature, human tissue sampling requires some slicing and dicing of the human body in order to excise a specimen. By contrast, extracting a sample for genetic analysis is far less invasive and can be had by collecting a number of different bodily fluids: blood and saliva are the most common.⁷⁷ Nonetheless, the removal of unnoticed cells, tissue or genetic material still amounts to the collection of valuable individual data.⁷⁸ Medical researchers use the tissues and DNA to study and develop countless products,

⁶⁸ See Leslie E. Wolf, *Advancing Research on Stored Biological Materials: Reconciling Law, Ethics, and Practice*, 11 MINN. J.L. SCI. & TECH. 99, 107 (2010).

⁶⁹ *Id.* at 128.

⁷⁰ *Id.* at 133-34.

⁷¹ *Id.* at 142.

⁷² *Id.* at 131.

⁷³ *Id.* at 107.

⁷⁴ Tissue bank refers to “a facility [used] for storing and maintaining a collection of tissues for future use in transplants.” *Tissue Bank Definition*, MOSBY’S MEDICAL DICTIONARY, <http://medical-dictionary.thefreedictionary.com/tissue+bank> (last visited Jan. 2, 2012). Banked tissues include arteries, cornea, semen, skin, tendons, and veins. *Id.*

⁷⁵ STERILIZATION OF TISSUES USING IONIZING RADIATIONS 36 (John F. Kennedy et al. eds., 2005).

⁷⁶ *Id.* at 27-29.

⁷⁷ SARDUL SINGH SANDHU, RECOMBINANT DNA TECHNOLOGY 43 (2010).

⁷⁸ *Id.*

including cancer treatments, flu vaccines, and pain relievers.⁷⁹ These samples are not collected just for medical diagnostic and treatment purposes either.⁸⁰ Scientists and researchers from non-profit research institutions and Fortune 500 companies alike expose the samples to a barrage of experiments—"radiation, drugs, cosmetics, viruses, household chemicals and biological weapons"—and then study reactions and damage.⁸¹ Billions of dollars flow in and out of research based upon these biological samples.⁸² No doubt, countless lives have been improved and even saved by the tests, vaccines, and treatments brought about by this research.⁸³

Whatever the vehicle—tissue scraps, donated DNA, or solicited DNA—there seems to be consensus that biological samples are vital and necessary trappings for biomedical research.⁸⁴ The divide occurs over whether any intellectual property rights to such samples and their man-made progeny exist, and, if so, who owns them?⁸⁵ While an in-depth conversation on tissue and gene ownership is beyond the scope of this Article, a basic overview of property rights in body parts helps to frame the issues related to direct-to-consumer genetic testing. At least in the abstract, the use of tissue and genetic samples to conduct and benefit research is not something that many people lose sleep over.⁸⁶ It becomes deeply personal, however, when those same samples come from you; your medical or genetic information lay open for analysis, criticism, and possibly profit.⁸⁷ Of course, such information is not broadcast over the airwaves, but to some donors it may as well have been. Collectively, human beings "often have a strong sense of ownership when it comes to their bodies. . . . [e]ven tiny scraps of it."⁸⁸ Whether this attitude is misplaced or well-

⁷⁹ Rebecca Skloot, *Taking the Least of You*, N.Y. TIMES (Apr. 16, 2006), <http://www.nytimes.com/2006/04/16/magazine/16tissue.html?adxnnl=1&pagewanted=all&adxnnlx=1312057723-dHFaoRER5kIA12vxRWJjGA>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See id.*

⁸⁴ *See id.*

⁸⁵ *Id.*

⁸⁶ *See generally id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

founded is a matter of perspective and whether a court views the issue as a question of property rights, informed consent, or something else altogether.⁸⁹ Moreover, those questions may not necessarily address the intellectual property (read: profit) issue.

1. Dibs on Tissue Scraps: The Ownership Question

To be sure, the ownership debate is not about absconding with vital or vestigial body parts. Courts have been reluctant to extend feelings of ownership into actual property rights.⁹⁰ After all, these are biological samples voluntarily donated or, in some cases, unwanted remnants of treatment, surgery or medical tests.⁹¹ For the most part, research entities have free rein over the samples in tissue banks; scientists call the shots on the research conducted and which samples will be used.⁹² Restrictions are few and far between, and efforts to curb the wide latitude afforded researchers have been less than successful.⁹³

Personal property rights in genes, tissue, and other biological remnants are a murky legal concept.⁹⁴ The increase in biomedical research and development requires an inexhaustible supply of samples.⁹⁵ It is undisputed that the research conducted with such samples can lead to some incredibly valuable medical technologies and treatments.⁹⁶ Setting aside the pure ownership question, once money enters the picture, the debate may transform into a

⁸⁹ Wolf, *supra* note 68, at 107.

⁹⁰ Skloot, *supra* note 79.

⁹¹ *Id.*

⁹² Some endeavors draw from a large pool of samples. The National Cancer Institute has a program that maps cancer genes using millions of tissue samples. Skloot, *supra* note 79. In addition, the Genographic Project is tracking human migration patterns by following genetic ties. *Id.*

⁹³ TRANSPLANTING HUMAN TISSUE: ETHICS, POLICY, AND PRACTICE 29 (Stuart J. Youngner et al. eds., 2004) (explaining that only four states have any kind of tissue bank regulation and that only 73 of approximately 300 tissue banks in America are AATB accredited).

⁹⁴ Wolf, *supra* note 68, at 107.

⁹⁵ See, e.g., MUSC Biomedical Research Bank, S.C. CLINICAL AND TRANSLATIONAL RES. INST., <https://sctr.musc.edu/index.php/musc-biomedical-research-bank> (last visited Jan. 2, 2012) (soliciting samples from patients and explaining the need for such samples in large scale biomedical research).

⁹⁶ *Id.*

heavyweight prizefight.⁹⁷ The developers of the technologies, pharmaceuticals and other treatments invest a tremendous amount of overhead into the products, and, in order to offset that development costs, seek patents for those products. The exclusivity afforded by a patent can allow profits to dwarf the original outlay of cash.⁹⁸ Consequently, the ownership question is coupled with the financial element: a formidable duo that can lead to extensive litigation.⁹⁹

The seminal case of *Moore v. Regents of the University of California*¹⁰⁰ established the prevailing thought that tissue donors do not retain a property interest in the biological material they voluntarily parted with.¹⁰¹ John Moore received treatment for hairy-cell leukemia at the University of California Los Angeles (UCLA) Medical Center; treatment included the removal of his spleen.¹⁰² Portions of Moore's spleen—the lymphokines—were later used to develop a cutting edge cell line to treat leukemia.¹⁰³ Moore's lymphokines gave researchers a blueprint from which they could synthetically reproduce the cellular secretions for mass production.¹⁰⁴ Expectedly, UCLA patented the cell line and a private company made millions from the cancer treatment.¹⁰⁵

⁹⁷ For example, *Moore* was appealed all the way to the California Supreme Court; such extensive litigation underlines the huge amounts of money involved. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990).

⁹⁸ See, e.g., *Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office*, 702 F. Supp. 2d 181, 203 (S.D.N.Y. 2010) (explaining that Myriad enjoyed revenues of \$222 million dollars in 2008 after the \$32 million it cost to provide the tests requested in that year).

⁹⁹ As discussed *supra* note 98, *Moore* was appealed all the way to the California Supreme Court. *Moore*, 793 P.2d 479. This was no doubt costly for both parties and is illustrative of the long, costly fights that ensue when large amounts of patent money enter the picture.

¹⁰⁰ 793 P.2d. 479 (Cal. 1990).

¹⁰¹ *Id.* Although a very significant consideration, the issue of informed consent and the extent of a knowing and voluntary release of right in biological samples is beyond the scope of this article. For a thorough discussion of those issues, see Wolf, *supra* note 68.

¹⁰² *Moore*, 793 P.2d at 481.

¹⁰³ *Id.* at 481-82 (explaining that pieces of Moore's spleen were used to develop the ultimate product and defining lymphokines as substances secreted by cells of the immune system).

¹⁰⁴ *Id.* at 482.

¹⁰⁵ *Id.* While the researchers and UCLA received only an initial payment from a private-sector developer, no one, including Moore's physician, ever informed him that his cells were used to generate profitable medical technology. *Id.* at 481.

Moore then sued for, among other things, a violation of his property rights.¹⁰⁶ The California Supreme Court rejected Moore's claims by determining that Moore's biological material could not be "unique" to him; his lymphokines possessed the same basic molecular structure as any other person's lymphokines.¹⁰⁷

Moore stood as the foundation for insulating research—and the valuable products—from the pesky donors.¹⁰⁸ *Moore* "makes obvious that individuals have no control over their genetic profile—and no property right or privacy right can create that control."¹⁰⁹ *Moore* does not stand alone, however, and its underpinnings have surfaced in other cases, albeit under different circumstances. In *Washington University v. Catalona*,¹¹⁰ the debate once again focused on ownership, but the ensuing mêlée pitted the scientist against his prior research university.¹¹¹ Dr. Catalona, a noted urologist, pioneered a new prostate-specific antigen (PSA) test used for prostate cancer screening.¹¹² Dr. Catalona developed this test during the course of his research at both Washington University and Northwestern University.¹¹³ While at Washington University, Dr. Catalona helped to create a Genitourinary (GU) Biorepository that contained biological samples accumulated by Dr. Catalona and his Washington University colleagues.¹¹⁴

When Dr. Catalona moved to Northwestern University, he took his research and many of his patients' biological samples with him.¹¹⁵ Washington University was none too pleased that Dr. Catalona moved both his research and the samples to Northwestern, and the school filed a declaratory judgment action

¹⁰⁶ *Id.* at 482.

¹⁰⁷ *Id.* at 490.

¹⁰⁸ See Gabel, *supra* note 42, at 32 (explaining that *Moore* makes it obvious that individuals have no property rights to their DNA).

¹⁰⁹ *Id.*

¹¹⁰ 490 F.3d 667 (8th Cir. 2007).

¹¹¹ *Id.* at 670.

¹¹² Wolf, *supra* note 68, at 113.

¹¹³ *Id.* at 113-14.

¹¹⁴ *Catalona*, 490 F.3d at 670.

¹¹⁵ *Id.* at 672. Dr. Catalona sent written requests to his patients asking that they consent to the transfer of the materials to the Northwestern tissue bank. *Id.* Some 6000 patients (of the 50,000 to 60,000 who received requests) agreed to and signed the transfer. *Id.*

against the doctor seeking ownership rights to the samples.¹¹⁶ Tribulation and litigation followed, but ultimately the district court granted Washington University's request, recognizing the school's ownership rights and expressly stating that neither the doctor nor the donors had any ownership interest in the samples.¹¹⁷ Consequently, the signed transfer agreements were invalid.¹¹⁸ The Eighth Circuit affirmed this decision, agreeing that public policy demanded an open-access format that prevented any one researcher (or donor) from hoarding samples.¹¹⁹ At the time, the district court seemed to dramatize an inevitable Biorepository Armageddon had it reached a different result:

Medical research can only advance if access to these materials to the scientific community is not thwarted by private agendas. If left unregulated and to the whims of a [research participant], these highly-prized biological materials would become nothing more than chattel going to the highest bidder. . . . Selling excised tissue or DNA on E-Bay would become as commonplace as selling your old television on E-Bay. . . . No longer could research protocols rely on aggregate collections since individual samples would come and go. Accountability would no longer exist since institutions would merely be warehouses filling purchase orders.¹²⁰

Whether this characterization marks the beginning of an urban legend (note the *Urban Dictionary*'s definition of "organ harvest")¹²¹ or uncannily predicts the future of biomedical research, those concerns belie a larger incongruity. One scholar astutely observed: "It is ironic that among those who have sought to remove their materials from research have done so not to prevent others from sharing the benefits of research, but rather to broaden access or to avoid exploitation and research viewed to denigrate a person's racial or ethnic background."¹²²

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 673.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 676-77.

¹²⁰ *Wash. Univ. v. Catalona*, 437 F. Supp. 2d 985, 1002 (E.D. Mo. 2006).

¹²¹ See, e.g., *Organ Harvest Definition*, URBANDICTIONARY.COM, <http://www.urbandictionary.com/products.php?txtid=1925819> (last visited Jan. 2, 2012).

¹²² Wolf, *supra* note 68, at 118.

As cases like *Moore* and *Catalona* demonstrate, the issue of individual ownership of biological samples seemed settled; biomedical research could proceed with fewer restrictions in order to advance science, medical treatment, and the continued health of the target patient groups. But what happens when the research implicates not just a set of individual, largely unrelated, and sometimes anonymous samples, but an entire culture, its people, and its origins? And what if that research occurs without the consent of the participants? Does the ownership calculation change at all?

Members of the Havasupai Tribe occupy a small village in the bottom of the Grand Canyon.¹²³ In 1963, John Martin, an anthropology professor from Arizona State University ("ASU") began studying the Havasupai.¹²⁴ Over the course of decades, Martin fostered a strong relationship with the Havasupai, working with its members on a variety of social, community, and environmental programs. In 1989, Martin was asked to study the "perceived 'epidemic' of diabetes among tribal members."¹²⁵ Martin hypothesized that the diabetes was connected to genetics and diet.¹²⁶ Thus, Martin contacted his colleague, Therese Markow, an ASU genetics professor, who agreed to collaborate with him on a "diabetes-centered project."¹²⁷ For her part, Markow sought to expand the research to the incidence of schizophrenia among tribe members.¹²⁸ Martin thought the tribe would reject any additional studies, but did not throw the kill switch on the idea.¹²⁹

Ultimately, the ASU researchers proposed a large blood draw from more than 200 Havasupai.¹³⁰ As a token of its appreciation for the research cooperation, ASU benevolently bestowed some free summer classes upon fifteen tribal members.¹³¹ The diabetes

¹²³ *Havasupai Tribe of Havasupai Reservation v. Arizona Bd. of Regents*, 204 P.3d 1063, 1066 (Ariz. Ct. App. 2008).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 1066-67.

¹³⁰ *Id.* at 1067.

¹³¹ *Id.*

research soon reached an end with the conclusion that the disease ran rampant through the tribe at such a pace that the cause could not be genetic.¹³² In 1991, Markow published a paper to that effect.¹³³ While the diabetes research ended with little more information than where it started, the blood samples (and the data collected from them) still existed, and new research was born.

Researchers at ASU and other institutions continued to use the Havasupai data to research “schizophrenia, inbreeding and theories about ancient human population migrations from Asia to North America.”¹³⁴ This research precipitated dozens of publications, including doctoral dissertations and academic papers.¹³⁵ One such article pinpointed that the Havasupai engaged in a high degree of inbreeding; a condition linked to an increased predisposition to disease.¹³⁶ Another article struck the core of Havasupai belief by proposing that the tribe’s ancestors came to the Grand Canyon only after crossing the frozen Bering Sea into North America.¹³⁷ This theory denigrated the traditional Havasupai legend that its people originated in the Grand Canyon and served as the canyon’s guardians.¹³⁸ When Martin learned of the additional genetic research that went far beyond the original diabetes-oriented consent of the tribe, he informed the Havasupai that “ASU may have ‘mishandled’ blood samples taken as part of the diabetes research project.”¹³⁹ As a result, the Havasupai issued a banishment order in May 2003, barring ASU from the reservation.¹⁴⁰

The tribe soon sued the Arizona Board of Regents (who oversee ASU) and Dr. Markow, but the trial court dismissed the case for failure to comply with Arizona’s notice-of-claims statute.¹⁴¹ But an appellate decision breathed new life into the

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Amy Harmon, *Indian Tribe Wins Fight to Limit Research of its DNA*, N.Y. TIMES, Apr. 22, 2010, at A1, available at <http://www.nytimes.com/2010/04/22/us/22dna.html>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Havasupai Tribe*, 204 P.3d at 1067.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1071.

case and in April 2010, the Board of Regents agreed to pay \$700,000 to forty-one members of the Havasupai Tribe.¹⁴² In addition, the Board also returned the blood samples and promised some much-needed assistance to the struggling tribe.¹⁴³ Amid concerns that researchers exploited a vulnerable group of people, the *Havasupai* case is also significant because the settlement suggests (among other things) that “the rights of research subjects can be violated when they are not fully informed about how their DNA might be used.”¹⁴⁴ Moreover, it implies that scientists may have an obligation to inform donors when research “creeps” beyond the scope of the study that donors initially agreed to participate in.¹⁴⁵

Moreover, the *Havasupai* case may also demonstrate the notion of “what you don’t know *can* hurt you.” Do donors know the extent of the genetic information that can be collected and interpreted from a single sample? It is clear from cases like *Moore* and *Havasupai* that what science would categorize as leftovers is the same material that donors consider to be an extension of who they are.¹⁴⁶ The plaintiffs in those cases “were willing to bring suit, with all the financial, emotional, and time burdens involved in litigation, and despite the long odds of winning,” to preserve their right to control the research performed on their biological samples.¹⁴⁷ Similarly, although the research may be divorced from the corporal connection, *Catalona* emphasizes that research institutions that house these samples feel a sense of ownership as well, and that they do not like to share.¹⁴⁸ Beyond the ownership issue, however, an argument can be made that many of these cases (excepting *Havasupai*) also underscore a monetary component. While research is expensive and time consuming, the rewards can be well worth the payout.¹⁴⁹ Donors and developers

¹⁴² Harmon, *supra* note 135.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See Gabel, *supra* note 42, at 48 (“Mission creep involves the expansion of a project beyond its original mission.”).

¹⁴⁶ Wolf, *supra* note 68, at 108, 125.

¹⁴⁷ *Id.* at 127.

¹⁴⁸ *Id.* at 116.

¹⁴⁹ See, e.g., *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 482 (Cal. 1990) (acknowledging from plaintiff’s brief that competing firms estimated the value of the lymphokines lines developed from Moore’s tissue at 3.01 billion dollars).

alike are interested in a piece of the pie when the research produces money-making treatments and products. For developers, the patent is the primary tool to preserve their interest and offset the research and development costs.¹⁵⁰ For donors, concerns over ownership and control transition into perhaps a more egocentric interest: remunerating the cradle of the crop.¹⁵¹

2. Money: Don't Take a Slice of My Gene

Companies have held patents for isolated genes and DNA for decades.¹⁵² A 2005 survey showed that twenty percent of human genes had been patented.¹⁵³ There is no recent estimate, but chances are that the number of patented genes now exceeds twenty percent.¹⁵⁴ The practice of patenting genes grew out of the use of the biological material in diagnostic tests and pharmaceutical research.¹⁵⁵ DNA is big business and rather than treating it like a part of the human body (such as a birthmark or eye color), it has been elevated to a product that generates profit.¹⁵⁶

Consequently, an isolated gene or DNA sequence¹⁵⁷ “can be patented in the same manner that a new medicine, purified from a plant, could be patented if an inventor identifies a [new] application.”¹⁵⁸ So, with at least 4000 of the nearly 24,000 genes in our body under patent protection, the patent holders hold property

¹⁵⁰ *Id.*

¹⁵¹ *Greenberg v. Miami Children's Hosp. Res. Inst., Inc.*, 264 F. Supp. 2d 1064, 1067 (S.D. Fla. 2003).

¹⁵² *Myriad's Gene-patent Battle, Gene-uinely Unclear*, ECONOMIST.COM (Aug. 4, 2011, 3:47 PM), <http://www.economist.com/blogs/schumpeter/2011/08/myriads-gene-patent-battle>.

¹⁵³ Stefan Lovgren, *One-Fifth of Human Genes Have Been Patented, Study Reveals*, NAT'L GEOGRAPHIC NEWS (Oct. 13, 2005), <http://news.nationalgeographic.com/news/pf/22064243.html>.

¹⁵⁴ Jason Mick, *Federal Court Rules it is Illegal to Patent Unaltered Human Genes*, DAILY TECH (Apr. 1, 2010, 12:00 PM), <http://www.dailytech.com/Federal+Court+Rules+it+is+Illegal+to+Patent+Unaltered+Human+Genes/article18033.htm> (explaining that over twenty percent of human genes are now patented).

¹⁵⁵ Lovgren, *supra* note 153.

¹⁵⁶ *Id.*

¹⁵⁷ “Gene isolation” refers to the isolation of a particular gene from the rest for use in genetic engineering. See *Gene Isolation Definition*, BIOLOGY ONLINE, http://www.biology-online.org/dictionary/Genetic_isolation (last visited Jan. 2, 2012).

¹⁵⁸ Lovgren, *supra* note 153 (internal quotation marks omitted).

rights over these genes.¹⁵⁹ In that same 2005 survey, it was estimated that about sixty-three percent of patents are held by private firms while twenty-eight percent reside with universities.¹⁶⁰ Setting aside the moral debate as to whether someone *else* owns our genes, the legal implications alone can be mind-numbing. One recent case underscores that.

In 2006, Genae Girard was diagnosed with breast cancer.¹⁶¹ Girard later took a genetic test to determine if her genes also indicated an increased risk for ovarian cancer.¹⁶² When the results for ovarian cancer were positive, Girard sought a second opinion.¹⁶³ But Girard could not take a different genetic test because none existed; only one company, Myriad Genetics (Myriad), occupied that genetic testing territory due to its patent on two genes that are closely associated with increased risk for breast cancer and ovarian cancer.¹⁶⁴ Myriad also held the exclusive patent on the corresponding test that measures a patient's risk of developing either disease.¹⁶⁵ Girard decided to battle the legal monopoly in court, and led a lawsuit against the patent holders—Myriad and the University of Utah Research Foundation—and against the entity in charge of reviewing and determining whether to grant a patent—the United States Patent and Trademark Office (PTO).¹⁶⁶

The American Civil Liberties Union and the Public Patent Foundation filed the groundbreaking suit on behalf of Girard, other cancer patients, researchers, genetic counselors, women's health groups, and "scientific associations representing 150,000 geneticists, pathologists, and laboratory professionals."¹⁶⁷ More than just a question about the sanctity of a patent, the plaintiffs

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ John Schwartz, *Cancer Patients Challenge the Patenting of a Gene*, N.Y. TIMES, May 13, 2009, at A16, available at <http://www.nytimes.com/2009/05/13/health/13patent.html?pagewanted=print>.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *ACLU Challenges Patents on Breast Cancer Genes*, ACLU (July 30, 2011), <http://www.aclu.org/free-speech-womens-rights/aclu-challenges-patents-breast-cancer-genes-0>.

¹⁶⁷ *Id.*

alleged that the gene patents and resulting market restrictions hindered the practice of medicine to the point of “mediocrity” and blocked new areas of research and development.¹⁶⁸ For the patent holders, the argument was more simplified and based on the bottom line: the patents served as the reward for the money invested to get there.¹⁶⁹

The stage was set for a battle, and it was clear from the outset that this was one case that could not be settled. The issue is not lengthy: Can a company patent a gene? As of this writing, that answer is yes, but this case is one that seems destined for a turn in the Supreme Court.¹⁷⁰ The first decision in this case featured a brazen 156-page opinion authored by Judge Sweet in the Southern District of New York,¹⁷¹ and answered the same question with a resounding no.¹⁷² In *Association for Molecular Pathology v. United States Patent and Trademark Office* (Myriad),¹⁷³ the district court agreed that Myriad’s patents on the BRCA1 and BRCA2 genes prevented other clinicians from independently looking at and interpreting a person’s BRCA1 and BRCA2 genes.¹⁷⁴ It also concluded that the patents precluded easy access to predictive tests and retarded potential innovation in testing technologies used to detect increased cancer risks in patients.¹⁷⁵

After denying Myriad’s motion for summary judgment, Judge Sweet ultimately found the patents invalid. His reasoning showed a shift in perception concerning genes, which had long been thought of as chemical entities, that, when isolated, became unique and patentable.¹⁷⁶ In his opinion, Judge Sweet determined that because genes are information-carrying molecules whose data

¹⁶⁸ Lovgren, *supra* note 153.

¹⁶⁹ *Id.*

¹⁷⁰ Ellen McDermott, *Myriad Ruling is a Signal to the Supreme Court*, MANAGING INTELLECTUAL PROPERTY (Aug. 11, 2011), <http://www.managingip.com/Article/2882082/Myriad-ruling-is-a-signal-to-the-Supreme-Court.html>.

¹⁷¹ *Ass’n for Molecular Pathology v. U.S. Patent & Trademark Office*, 702 F. Supp. 2d 181 (S.D.N.Y. 2010).

¹⁷² *Id.* at 232.

¹⁷³ 702 F. Supp. 2d 181 (S.D.N.Y. 2010).

¹⁷⁴ *Id.* at 208-09.

¹⁷⁵ Andrew Cohen, *Nature vs. Nurture: The Continuing Saga of the Gene Patenting Case*, ATLANTIC (Apr. 3, 2011, 8:27 AM), <http://www.theatlantic.com/national/archive/2011/04/nature-vs-nurture-the-continuing-saga-of-the-gene-patenting-case/73359/>.

¹⁷⁶ *Id.*

content does not depend on whether they are in their natural environment, isolation by itself does not make the gene *novel*, a prerequisite for patentability.¹⁷⁷ In an amicus brief filed in the federal appeals court, the Department of Justice agreed, advocating the position that human genes which had only been isolated should not be eligible for patents.¹⁷⁸

Though the district court decision raised alarm among pharmaceutical companies and research institutions alike, it was initially seen as cabined, both in the type of patent held invalid (seven specific genes) as well as the authority of the decision (it was only binding in the southern district of New York, and even then, only if it was not overturned on appeal).¹⁷⁹ As it turned out, the consolation prize would become the crowning victory for Myriad when the Federal Circuit Court of Appeals overturned Sweet's ruling in a resounding, albeit splintered, opinion.¹⁸⁰

The majority opinion, authored by Judge Alan Lourie, rejected the "magic microscope test"¹⁸¹ proffered by the government in its amicus brief and instead held that "when cleaved, an isolated DNA molecule . . . [is] a distinct chemical entity."¹⁸² The court focused on this cleaving, characterizing it as "the act of human invention"¹⁸³ and voiced concerns that the magic microscope test was a visualization test which could be focused in on any part of a DNA molecule, rendering it unpatentable, and thereby chilling innovation.¹⁸⁴ In addition to the majority opinion, Judge Kimberly Moore wrote a concurring opinion in which she used slightly different reasoning to reach the

¹⁷⁷ *Id.*

¹⁷⁸ Ashby Jones, *A Patent Mistake? DOJ's Reversal on Genes Raising Questions*, WALL ST. J. L. BLOG (Nov. 2, 2010, 5:39 PM), <http://blogs.wsj.com/law/2010/11/02/a-patent-mistake-doj-s-reversal-on-genes-raising-questions/>.

¹⁷⁹ Andrew Pollack, *After Patent on Genes is Invalidated, Taking Stock*, N.Y. TIMES, Mar. 30, 2010, at B1, available at <http://www.nytimes.com/2010/03/31/business/31gene.html?scp=1&sq=gene&st=cse>.

¹⁸⁰ *Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office*, 2011 U.S. App. LEXIS 15649, at *74-75 (Fed. Cir. July 29, 2011).

¹⁸¹ *Id.* at *50 (explaining the government's position that if a "magic microscope" could focus on the claimed DNA molecule as it exists in nature, then the claim is for unpatentable matter).

¹⁸² *Id.* at *57.

¹⁸³ *Id.* at *62.

¹⁸⁴ *Id.* at *61.

majority's conclusion.¹⁸⁵ Meanwhile, Judge William Bryson dissented from the majority opinion concerning the patentability of the isolated genes.

In his dissent, Bryson stated that, contrary to the majority opinion, he did not believe that the mere act of isolating a gene is enough to make the resulting product patent-eligible material.¹⁸⁶ In support of his view, Bryson noted that Myriad is free to patent applications of its discovery, but not the genes themselves.¹⁸⁷ Judge Bryson compared the isolation of genes to snapping a leaf from a tree,¹⁸⁸ and noted that policy considerations (such as the frustration of research and the future treatment of breast and ovarian cancers) militated against granting a gene patent.¹⁸⁹ Moreover, Bryson emphasized broader concerns over the potential hurdles smaller gene patents place in front of firms attempting to sequence many genes or even entire human genomes rapidly.¹⁹⁰ To Bryson, the majority's opinion was one so focused on economics that it ignored the potentially larger consequences.¹⁹¹

But the patent reward is meant to offset upfront costs.¹⁹² Without it, companies would be unwilling to invest the time, personnel, and millions of dollars on a venture that would later be shared by others riding on the coattails of their investment.¹⁹³ But can this outweigh the concern that those same patents stifle later innovation that might advance the technology?¹⁹⁴ That question will not be answered by this Article, but for now it seems that biotech companies have quite literally bought some time. Given the Federal Circuit's fractured opinion, however, this likely is not

¹⁸⁵ *Id.* at *92 (Moore, J., concurring) (explaining that the mere fact that the isolated DNA consisted of different molecules than native DNA was not enough to render the isolations patent-eligible, but since the isolated DNA is not naturally occurring in nature without the assistance of man, the DNA, once isolated, became patent-eligible material).

¹⁸⁶ *Id.* at *118 (Bryson, J., dissenting).

¹⁸⁷ *Id.* at *119.

¹⁸⁸ *Id.* at *129.

¹⁸⁹ *Id.* at *120.

¹⁹⁰ *Id.* at *138.

¹⁹¹ *Id.* at *137-38.

¹⁹² Deborah L. Shelton, *Gene-Patenting Issue Not Settled Despite Ruling*, CHI. TRIBUNE (Apr. 1, 2010, 8:28 PM), <http://archive.chicagobreakingnews.com/2010/04/issue-of-patenting-human-genes-not-settled-despite-ruling.html>.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

Myriad's last dance in court.¹⁹⁵ The Supreme Court's hand may finally be forced to give a bright line rule on the parameters of patent-eligibility for genes (and maybe other biological samples).¹⁹⁶

Beyond the context of property rights and patent claims lies a more fundamental concern about the information our DNA contains and what we understand about those contents. Just as forensic DNA testing has expanded in criminal cases to identify offenders, so too has the warehousing of the DNA collected. All fifty states and the federal government¹⁹⁷ have laws on the books pertaining to the collection and retention of DNA samples and test results. In some states, these DNA data banking laws require the collection of samples from both convicted offenders and arrestees.¹⁹⁸

The argument for storing all of this genetic information has long been that forensic DNA testing specifically uses non-coding

¹⁹⁵ Michelle Spektor, *Genes are Still Patentable, Federal Appeals Court Rules*, SCIENCE PROGRESS (Aug. 17, 2011), <http://scienceprogress.org/2011/08/genes-are-still-patentable/> (explaining that Myriad plaintiffs are expected to either ask for an en banc rehearing or appeal to the Supreme Court).

¹⁹⁶ The Supreme Court's recent ruling in *Bilski v. Kappos*, 130 S. Ct. 3218 (2010), offers some guidance on novel patents. *Bilski* was highly anticipated because it gave the justices an opportunity to close the door on business method patents by requiring an invention to be associated with a particular machine or transform something into a different state or thing in order to be patentable. Such a ruling could have had a devastating impact on gene patenting, which doesn't quite fit into either definitional confine. *Bilski*, however, failed to measure up to the landmark decision hoped for by its followers and the justices, while holding the specific patent in question was invalid, did not limit patents to only those inventions which passed the machine or transformation tests, leaving the door open for future business method patents. See John Schwartz, *Justices Take Broad View of Business Method Patents*, N.Y. TIMES, June 29, 2010, at B1, available at <http://www.nytimes.com/2010/06/29/business/29patent.html>; John Schwartz, *Justices Hear Patent Case on Protecting the Abstract*, N.Y. TIMES, Nov. 10, 2009, at B1, available at <http://www.nytimes.com/2009/11/10/business/10patent.html?sq=bilski&st=cse&adxnnl=1&scp=2&adxnnlx=1310954447-jPAj2p9y+Z2quK4zGVp2Qw>.

¹⁹⁷ See 42 U.S.C. §§ 14131-14134 (2006); see also Robin Cheryl Miller, Annotation, *Validity, Construction, and Operation of State DNA Database Statutes*, 76 A.L.R. 5TH 239, 252 (2000).

¹⁹⁸ See, e.g., VA. CODE ANN. § 19.2-310.2:1 (2008) ("Every person arrested for the commission or attempted commission of a violent felony . . . shall have a sample of his saliva or tissue taken for DNA . . . analysis to determine identification characteristics specific to the person.").

regions on DNA.¹⁹⁹ In other words, those segments of DNA—called short tandem repeats—have no bearing on gene expression and the genotypes and phenotypes associated with those genes.²⁰⁰ Termed “junk DNA,” law enforcement officials contend that genetic information retrieved in forensic DNA testing has no more significance than numbers on a license plate. The CODIS loci function as identifiers, and nothing more.²⁰¹ Critics of this convenient explanation—including myself—argue that the breakneck pace of genetic technology demonstrates that what we once referred to as “junk DNA” may later be found to contain valuable genetic information.²⁰²

In *People v. Buza*,²⁰³ a California appeals court held the collection of DNA samples from arrestees unconstitutional as a violation of the Fourth Amendment’s protection against unreasonable searches and seizures. Buza was arrested on suspicion of lighting a police car on fire. Under the California DNA Act, as amended by California voters in 2004,²⁰⁴ a DNA specimen is to be taken from individuals arrested and charged with a felony “immediately following arrest, or during the booking”²⁰⁵ of that individual. Buza repeatedly refused to consent to a buccal²⁰⁶ swab after his arrest and was charged with a misdemeanor for failure to provide a DNA sample.²⁰⁷ After initially pleading not guilty to all charges, Buza admitted at trial to setting fire to the police car and was found guilty of all counts, including the misdemeanor for failure to provide a DNA sample. Shortly after his conviction, the court ordered Buza to provide a

¹⁹⁹ See *Saved By Junk DNA: Vital Role in the Evolution of Human Genome*, SCI. DAILY (May 28, 2009), <http://www.sciencedaily.com/releases/2009/05/090528203730.htm> (“Scientists used to believe that . . . non-coding DNA is useless trash that has sneaked into our genome and refuses to leave.”).

²⁰⁰ JOHN M. BUTLER, *FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS* 17-22 (2d ed. 2005).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ 129 Cal. Rptr. 3d 753 (Cal. Ct. App. 2011).

²⁰⁴ *Id.* at 757 (explaining that voters amended the California DNA Act by “enacting Proposition 69, the DNA Fingerprint, Unsolved Crime and Innocence Protection Act”).

²⁰⁵ *Id.* (internal quotation marks omitted).

²⁰⁶ See IDA G. DOX ET AL., *ATTORNEY’S ILLUSTRATED MEDICAL DICTIONARY* B35 (1997) (defining buccal as “relating to the cheek”). Thus, a buccal swab is a cheek swab.

²⁰⁷ *Buza*, 129 Cal. Rptr. 3d at 755.

DNA sample. He again refused, and this time the court authorized the use of reasonable force to bring him within compliance.²⁰⁸

After eventually providing the sample, Buza was sentenced to sixteen months in jail and informed that his conviction would cause his sample to be included in the state's forensic DNA database.²⁰⁹ Buza appealed the misdemeanor conviction on the collateral issue that the mandatory DNA sample violated his Fourth and Fourteenth Amendment rights in addition to his privacy rights under the California Constitution.²¹⁰ The court honed in on the Fourth Amendment claim and reversed the misdemeanor conviction.²¹¹

Within its reasoning, the court faulted the language of the California DNA Act for authorizing warrantless, suspicionless searches (vis-à-vis the collection of DNA evidence) without a judicial determination of probable cause.²¹² In doing so, the court distinguished the case at bar with *United States v. Pool*²¹³ where the court held that certain arrestees could be required to give a DNA sample as a condition for pretrial release.²¹⁴ The *Buza* court emphasized that the arrestee in *Pool* was required to give a sample "after a judicial . . . determination of probable cause [had] been made for felony criminal charges against [the] defendant."²¹⁵ This judicial determination was the lynchpin for the *Buza* court; without it, an arrestee cannot be forced to give a DNA sample. In so holding, the court seemed a bit skittish about relying solely on the arresting officer's determination of probable cause, voicing concern that officers seeking a DNA sample from an individual may arrest them simply to obtain it.²¹⁶

Next, the court addressed the prosecution's argument that DNA samples—as vehicles of identification—were no different from fingerprints.²¹⁷ The court pointed to two other cases that had

²⁰⁸ *Id.* at 755-56.

²⁰⁹ *Id.* at 756.

²¹⁰ *Id.* at 755.

²¹¹ *Id.*

²¹² *Id.* at 777.

²¹³ 645 F. Supp. 2d 903 (E.D. Cal. 2009).

²¹⁴ *Id.* at 913.

²¹⁵ *Buza*, 129 Cal. Rptr. 3d at 763 (alteration from original).

²¹⁶ *Id.* at 780-81.

²¹⁷ *Id.* at 768-770.

accepted this analogy: *United States v. Mitchell*²¹⁸ and *Haskell v. Brown*.²¹⁹ Both courts focused on the difference between DNA samples, containing the entire human genome, and DNA profiles in CODIS, which were derived from “junk DNA.”²²⁰ They reasoned that because the profiles only contained limited information, federal statutes protect the misuse of sample information, and the technology behind DNA testing was limited, the DNA profiles could only be used for identification purposes and misuse of the samples was speculative.²²¹

Ultimately, the *Buza* court rejected the reasoning in these cases.²²² First, it pointed out that DNA evidence is primarily an investigative tool that is impractical for identification purposes since it can take up to thirty-one days for a sample to be processed and other methods of identification, such as fingerprinting, render it unnecessary to determine identity at booking.²²³ Second, it questioned the soundness of the assertion that “junk DNA” does not contain genetic programming material, pointing out that recent studies have questioned this theory.²²⁴ The court also cautioned that even if “junk DNA” does not contain useful information, the profiles themselves are derived from blood and buccal swab samples, which have to be collected and stored.²²⁵ Because of this storage procedure, “the advance of science promises to make stored DNA only more revealing.”²²⁶ Finally, the court reasoned that fingerprinting had long been routine before the Fourth Amendment began to be applied to the arrest and booking process, yet this grandfathered-in status could not be used to circumscribe Fourth Amendment protections. The court effectively refused to bootstrap DNA fingerprinting in with traditional fingerprints.²²⁷

²¹⁸ 681 F. Supp. 2d 597 (W.D. Pa. 2009), *rev'd*, 652 F.3d 387 (3d Cir. 2011).

²¹⁹ 677 F. Supp. 2d 1187 (N.D. Cal. 2009).

²²⁰ *Buza*, 129 Cal. Rptr. 3d at 768.

²²¹ *Id.*

²²² *Id.* at 767.

²²³ *Id.* at 772.

²²⁴ *Id.* at 768-69.

²²⁵ *Id.* at 769.

²²⁶ *Id.* (internal quotation marks omitted).

²²⁷ *Id.* at 770.

Additionally, the court balanced the arrestee's interest in privacy against the government's interest in obtaining his DNA. Because an arrestee enjoyed the presumption of innocence, this balance had to be struck in favor of the individual's privacy.²²⁸ This marked a departure from prior court rulings on the subject.²²⁹ Finally, the court emphasized that while DNA databases can be helpful in resolving unsolved cases and pursuing leads in open cases, "the effectiveness of a crime fighting technology does not render it constitutional."²³⁰

Buza marks perhaps the first time that a court has acknowledged the gravity of collecting, processing, and retaining an individual's DNA in the criminal context.²³¹ Forensic DNA testing is a significant tool in criminal investigations. It is subject to rigorous testing and protocols, and time and again it has proven to be a reliable method of identifying individuals. Those safeguards cannot, however, insure that a person's biological sample (and thus genetic information) is not vulnerable to misuse.²³² These same concerns also apply to direct-to-consumer genetic testing. If we are still addressing concerns over privacy and security in the context of forensic DNA testing, a science that has been routinely validated in laboratories and courts for almost twenty-five years, then our expectations of genetic testing should be cautious and measured.

²²⁸ *Id.* at 782-83.

²²⁹ See *United States v. Mitchell*, 652 F.3d 387, 412-13 (3d Cir. 2011) (holding that DNA collection from arrestees is permissible because it occurs only after probable cause for arrest has been determined by the arresting officer); *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1198-99 (N.D. Cal. 2009) (emphasizing the government's interest in identifying suspects); *United States v. Pool*, 645 F. Supp. 2d 903, 910 (E.D. Cal. 2009) ("[T]he decision to impose the DNA testing requirement on pre-trial detainees or releasees seems clearly warranted, if not compelling. An arrestee's identity obviously becomes a matter of legitimate state interest.").

²³⁰ *Buza*, 129 Cal. Rptr. 3d at 783.

²³¹ See Paul M. Monteleoni, *DNA Databases, Universality, and the Fourth Amendment*, 82 N.Y.U. L. REV. 247, 247-49 (2007) (explaining that the courts have upheld DNA databank statutes in the face of Fourth Amendment challenges, and arguing that states lack the proper safeguards to avoid the potential for misuse of collected DNA).

²³² *Buza*, 129 Cal. Rptr. 3d at 780-81 (voicing concern that officers would be tempted to make an arrest merely to obtain a DNA sample from a suspect).

II. A NEW MACHINE: DO-IT-YOURSELF DNA

Clearly, the field of genetics can be a cash cow, and it seems everyone from pharmaceutical companies to universities is jumping on the bandwagon to research, develop, patent, and of course, profit.²³³ The common thread among those researching and developing this category of *medical-diagnostic* genetic testing is that the end-product generally reaches the patient only through a medical provider after lengthy trials and the Federal Drug Administration approval process.²³⁴ Consequently, medical-diagnostic genetic testing has critical points of regulation—some legal (the FDA) and others informational (individual doctors and other health care providers).²³⁵ But the regulations associated with this sector of genetic testing are not the focus of this Article.

The technology that spurred genetic breakthroughs, however, is not limited to pharmaceutical and educational entities. The profit potential attracted entrepreneurs, who could create other genetic tools for use outside of the medical provider context.²³⁶ The Human Genome Project and its progeny embraced a model of licensing and sharing genetic technology with private companies.²³⁷ Moreover, gene sequencing has become cheaper. In 2009, a Stanford engineer spent a mere \$50,000 (pennies in genetic research dollars) to decode his own genome with

²³³ For example, in *Myriad*, The University of Utah Research Foundation held the genetic patents in conjunction with Myriad Pharmaceuticals. *Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office*, 702 F. Supp. 2d 181, 185 (S.D.N.Y. 2010).

²³⁴ See *Who Regulates Genetic Tests?*, GENETICS & PUB. POL'Y CTR., http://www.dnapolicy.org/policy.issue.php?action=detail&issuebrief_id=10 (last updated May 30, 2008) (explaining that all clinical laboratories are subject to CLIA regulations, and their testing kits are subject to FDA regulation). This is in marked contrast to laboratory developed tests (LDTs)—or “homebrews”—which are medical tests developed and performed in the same laboratory. LDTs fall outside the FDA approval and oversight powers, and many direct-to-consumer genetic testing companies characterize their tests as LDTs. See, e.g., *Diagnostic Kits/ Glossary: Abbreviations*, BERKMAN, available at http://cyber.law.harvard.edu/commonsbasedresearch/Diagnostic_Kits/Glossary (last visited Jan. 2, 2012).

²³⁵ *Id.*

²³⁶ Misha Angrist & Robert M. Cook-Deegan, *Who Owns the Genome?*, NEW ATLANTIS, Winter 2006, at 87-96, available at <http://www.thenewatlantis.com/publications/who-owns-the-genome>.

²³⁷ *Id.*

sequencing technology that he invented.²³⁸ The engineer—aptly named Dr. Quake—believed that the lower costs would shake-up the industry and “democratize access to the fruits of the genome revolution.”²³⁹ Currently, research groups are in a race to sequence the human genome for \$1000.²⁴⁰ Scientists estimate that this low-dollar figure could be achieved as soon as 2013.²⁴¹

Lower costs breed “new entr[ies] in that horse race,”²⁴² and this business model has now spawned (and perhaps unknowingly coddled) new genetic tests that are sold directly to consumers.²⁴³ Predictably, there was a market to welcome these new genetic testing applications.²⁴⁴ Indeed, cases like Myriad demonstrate that consumers want options with genetic testing and will actively seek out the alternatives.²⁴⁵ Unfortunately, as this Article will illustrate, if gene patenting becomes a routine practice (blessed by the Supreme Court), the result may push patients to the Genetic Grouppons, a shadowy industry that has only recently come under some superficial scrutiny from the FDA and other regulatory bodies.²⁴⁶

²³⁸ Nicholas Wade, *Cost of Decoding a Genome Is Lowered*, N.Y. TIMES, Aug. 11, 2009, at D3 [hereinafter Wade, *Cost of Decoding*], available at <http://www.nytimes.com/2009/08/11/science/11gene.html>.

²³⁹ *Id.* Previously, unlocking an entire genome required massive resources, and few companies and universities possessed the technology, staff, and cash to decode a human genome's three billion genetic units. *Id.*

²⁴⁰ Nicholas Wade, *Decoding DNA with Semiconductors*, N.Y. TIMES, July 21, 2011, at A13, available at <http://www.nytimes.com/2011/07/21/science/21genome.html>.

²⁴¹ *Id.*

²⁴² Wade, *Cost of Decoding*, *supra* note 238.

²⁴³ MARY FRAKER ET AL., DIRECT-TO-CONSUMER GENETIC TESTING: SUMMARY OF A WORKSHOP 1-6 (2010).

²⁴⁴ *Id.*

²⁴⁵ Part of the reason cited by plaintiffs for bringing the lawsuit against Myriad was the inability to obtain BRCA1 and BRCA2 analysis from companies other than Myriad. Ass'n for Molecular Pathology v. U.S. Pat. & Trademark Office, No. 2010-1406, 2011 U.S. App. LEXIS 15649, at *24 (Fed. Cir. July 29, 2011), *aff'g in part, rev'g in part* 702 F. Supp. 2d 181 (S.D.N.Y. 2010).

²⁴⁶ See, e.g., Dan Vorhaus, *DTC Genetic Testing and the FDA: Is There an End in Sight to the Regulatory Uncertainty?*, GENOMICS L. REP. (June 16, 2011), <http://www.genomicslawreport.com/index.php/tag/pathway-genomics/>.

A. Rise of the Genetic Groupons

Genetic tests have come to hold a more prominent role in health care.²⁴⁷ While not yet a routine feature of clinical medicine practice, that milestone is probably not far off.²⁴⁸ There are more than 1000 clinical tests to detect genetic variations and possible disease risks for more than 200 separate medical infirmities.²⁴⁹ Most of these are available only through a medical provider—such as the BRAC Analysis test for breast cancer—but some two dozen genetic test kits are available directly to consumers, and their use is gaining ground.²⁵⁰

The term *genetic testing* covers an “array of techniques” that includes, among other things, analysis of human DNA.²⁵¹ Generally speaking, genetic tests are used as a medical tool to detect gene variants connected to a specific disease or condition. In the clinical setting (clinical genetic testing), the tests can be performed to “confirm a suspected diagnosis, to predict the possibility of future illness, to detect the presence of a carrier state in unaffected individuals (whose children may be at risk), and to predict response to therapy.”²⁵² Non-clinical uses for genetic testing include forensic DNA analysis to identify criminal offenders as well as tests to determine paternity, identify health risks, and predict vulnerability.²⁵³ This latter group of tests—paternity, health risks, and disease predictions—has been

²⁴⁷ See *Medicine and the New Genetics*, HUM. GENOME PROJECT INFO., http://www.ornl.gov/sci/techresources/Human_Genome/medicine/medicine.shtml (last modified Jan. 2, 2011).

²⁴⁸ *Id.*

²⁴⁹ Jennifer A. Gniady, *Regulating Direct-to-Consumer Genetic Testing: Protecting the Consumer Without Quashing a Medical Revolution*, 76 FORDHAM L. REV. 2429, 2436 (2008); see also *Gene Testing*, HUM. GENOME PROJECT INFO., http://www.ornl.gov/sci/techresources/Human_Genome/medicine/genetest.shtml (last modified Jan. 2, 2010).

²⁵⁰ For a comprehensive list of the companies offering DTC genetic testing services, including what they test for and whether the company offers genetic counseling services, see GENETICS & PUB. POL’Y CTR., <http://www.dnapolicy.org/resources/DTCTableAug2011Alphabydisease.pdf> (last modified Jan. 2, 2011).

²⁵¹ *Genetic Testing: Overview of Genetic Testing*, NAT’L HUM. GENOME RES. INST., <http://www.genome.gov/10002335> (last visited Jan. 2, 2011).

²⁵² *Id.*

²⁵³ *Id.*

aggressively marketed to consumers on the internet and elsewhere.²⁵⁴

Referred to as “Direct-to-Consumer” (DTC) genetic tests, the kits vary widely in the information provided. Some are diagnostic,²⁵⁵ others focus on ancestral lineage,²⁵⁶ some promise to use your DNA to match you with a genetically compatible date,²⁵⁷ and still others may offer a broad spectrum of information in a combination of categories.²⁵⁸ In addition, some companies bring the consumer into a genetic social networking community where people with common genes can find each other. Clearly, genetic testing has come a long way.

1. From Doctored DNA to DIY Genetics

Early genetic research took its time to move from Mendel’s peas to Watson and Crick’s double helix. By comparison, DTC genetic testing, which took its cues from research laboratory and clinical testing, zoomed onto the scene at a speed reminiscent of venture capitalists swarming the dot-com companies in the late 1990s.²⁵⁹ In the years surrounding the Human Genome Project, the National Human Genome Task Force on Genetic Testing was established by the NIH to propose policies and guidance for the “delivery of safe and effective genetic tests.”²⁶⁰ The Task Force issued a comprehensive report on genetic testing and defined the tests as follows:

The analysis of human DNA, RNA, chromosomes, proteins, and certain metabolites in order to detect heritable disease-

²⁵⁴ *Id.*

²⁵⁵ See, e.g., *DNA Predisposition Testing*, THE GENETIC TESTING LAB., INC., https://www.gtldna.net/predisposition.html?source=google_predisposition&gclid=CKPRzuKOh6sCFdgb2godJ2Bz5G (last visited Jan. 2, 2011).

²⁵⁶ See, e.g., GENETIC GENEALOGY, <http://www.dnaancestryproject.com/index.php> (last visited Jan. 2, 2011).

²⁵⁷ See, e.g., SCIENTIFICMATCH, *supra* note 6.

²⁵⁸ See, e.g., 23ANDME, *supra* note 1.

²⁵⁹ See Ciara Curtin, *The Science Behind DTC Genetic Testing*, GENOME TECH. (March 2009), <http://www.genomeweb.com/dxpgx/science-behind-dtc-genetic-testing> (describing how DTC testing “exploded onto the scene” in 2008).

²⁶⁰ *Task Force on Genetic Testing: Joint NIH-DOE Ethical, Legal and Social Implications Working Group of the Human Genome Project*, NAT’L HUM. GENOME RES. INST., <http://www.genome.gov/10001808> (last visited Jan. 2, 2012).

related genotypes, mutations, phenotypes or karyotypes for clinical purposes. Such purposes include predicting risk of disease, identifying carriers and establishing prenatal and clinical diagnosis or prognosis. Prenatal, newborn and carrier screening, as well as testing in high-risk families, are included. Tests for metabolites are covered only when they are undertaken with high probability that an excess or deficiency of the metabolite indicates the presence of heritable mutations in single genes. Tests conducted purely for research are excluded from the definition, as are tests for somatic (as opposed to heritable) mutations, and testing for forensic purposes.²⁶¹

The Task Force released its report in 1997. By 2006, “nutrigenetic” tests entered the market, and were sold online by a handful of companies.²⁶² These tests promised personal genetic testing accompanied by genetic profiles. Nutrigenetics purported to examine genetic variations associated with a body’s response to, among other things, diet, nutrition, and metabolism.²⁶³ The companies promised to deliver “[r]ecommendations . . . based on your own DNA” so that by “adjusting your diet and lifestyle to your genetic profile, you can make sure that your body functions at an optimum level.”²⁶⁴ In effect, these tests were the early predecessors to the “Bring Your Genes to Cal” program discussed earlier.²⁶⁵ In 2006, the federal government’s General Accounting Office (GAO) conducted a sting operation of sorts to determine whether the nutrigenetics tests provided the promised individual genetic profiles coupled with personalized nutritional spectrums.²⁶⁶

The GAO bought test kits from the companies and submitted saliva samples for testing.²⁶⁷ The GAO created a group of

²⁶¹ *Guidelines and Policies: Genetic Testing*, HIBM RES. GRP., http://www.hibm.org/hrg/hrgwww/forpatients:guidelines_and_policies (last visited Jan. 2, 2012).

²⁶² U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-997T, NUTRIGENETIC TESTING: TESTS PURCHASED FROM FOUR WEB SITES MISLEAD CONSUMERS 2 (2006), *available at* <http://www.gao.gov/new.items/d06977t.pdf>.

²⁶³ *Id.*

²⁶⁴ *Id.* at 18.

²⁶⁵ See *supra* notes 23-40 and accompanying text.

²⁶⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 262, at 2.

²⁶⁷ *Id.*

“fictitious consumers” by submitting twelve DNA samples all sourced from one nine-month-old female (with consent from her parents).²⁶⁸ The GAO also submitted two DNA samples taken from an unrelated forty-eight-year-old male in addition to samples taken from a dog, a cat, and “blank” samples containing no DNA information.²⁶⁹ Perhaps this set of samples was simply for entertainment, but the submissions were in fact returned by the laboratories because they could not be processed.²⁷⁰ Based on its investigation, the GAO issued a report entitled *Nutrigenetic Testing: Tests Purchased from Four Web Sites Mislead Consumers*.²⁷¹

At bottom, the GAO report determined that the nutrigenetic tests deceived consumers by promising impossible results they could not deliver.²⁷² Specifically, the GAO concluded that the tests were “medically unproven and . . . ambiguous”²⁷³ with “contradictory and . . . inaccurate lab results.”²⁷⁴ One test showed the presence of a variation in one gene while another test found no such variation.²⁷⁵ Moreover, the companies seemed to base their predictions on questionnaires filled out by the consumers as opposed to the actual genetic tests.²⁷⁶ One company even hocked its own expensive line of vitamins and supplements tailored to a consumer’s nutrigenetic profile.²⁷⁷ Ultimately, the GAO cautioned that the “unproven medical predictions” offered by those companies might “alarm consumers into thinking that they have an illness or that they need to buy a costly supplement in order to prevent an illness.”²⁷⁸ Worse yet, the GAO worried that inaccurate

²⁶⁸ *Id.* at 2-3. Although not reported, one might guess that this nine-month-old was the child of a parent employed by the GAO. Perhaps “training pants” come very early in that family.

²⁶⁹ *Id.* at 3.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 22.

²⁷³ *Id.* at 5.

²⁷⁴ *Id.* at 21.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 18.

²⁷⁷ *Id.* at 14.

²⁷⁸ *Id.* at 22.

test results might provide a false sense of confidence in one's health when that is anything but the case.²⁷⁹

The GAO's investigation, coupled with a Senate committee directive, prompted the Federal Trade Commission (FTC), the Food and Drug Administration (FDA), and the Centers for Disease Control (CDC) to publish a statement warning consumers to approach such tests with a "healthy dose of skepticism."²⁸⁰ According to the FDA, none of the nutrigenetic companies involved in the 2006 report remain on the market today.²⁸¹

In 2007, a new set of genetic tests emerged. Several new companies entered the scene selling DTC genetic testing services, smartly avoiding the lambasted nutrigenetic claims.²⁸² These companies predominantly leveraged recent technological advances that featured a single test, required only a small biological sample, and promised a broad array of genetic information.²⁸³ In its infancy, DTC genetic testing was largely recreational, revealing ancestry, physical characteristics, and other non-medical information.²⁸⁴ The testing companies quickly adopted the same tag line: the tests were not—in any form—diagnostic in nature and instead provided a form of consumer education in the context of their own genetics.²⁸⁵ Some of the companies farmed out the actual genetic testing and analysis to different laboratories rather than performing the tests in house.²⁸⁶ In 2007 and 2008,

²⁷⁹ *Id.*

²⁸⁰ FED. TRADE COMM'N, AT-HOME GENETIC TESTS: A HEALTHY DOSE OF SKEPTICISM MAY BE THE BEST PRESCRIPTION (2006), *available at* <http://www.ftc.gov/bcp/edu/pubs/consumer/health/hea02.pdf>.

²⁸¹ FOOD & DRUG ADMIN., MOLECULAR & CLINICAL GENETICS PANEL 16 (2011), *available at* <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/MedicalDevices/MedicalDevicesAdvisoryCommittee/MolecularandClinicalGeneticsPanel/UCM249857.pdf>.

²⁸² Andrew Pollack, *Consumers Slow to Embrace the Age of Genomics*, N.Y. TIMES, Mar. 20, 2010, at B1, *available at* <http://www.nytimes.com/2010/03/20/business/20consumergene.html>.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ Dan Vorhaus, *Personal Genomics Follows Pathway to Corner Drugstore; Is Regulation Next?*, GENOMICS L. REP. (May 11, 2010), <http://www.genomicslawreport.com/index.php/2010/05/11/pathway-walgreens-and-dtc-regulation/> (explaining that 23andMe, for example, outsources its genetic testing to an outside lab).

the FDA noted that most of the reporting of test results appeared to come from facilities that were not certified CLIA laboratories and, moreover, were not certified by the state in which they were located.²⁸⁷

While federal concern was rising, some states also started to scrutinize DTC genetic testing. California took matters into its own hands in 2007 when it issued thirteen “cease and desist” letters to DTC testing companies that offered the genetic tests despite a state law that required a doctor’s prescription for testing.²⁸⁸ Moreover, California took aim at the companies’ use of non-CLIA certified labs.²⁸⁹ On the heels of California, New York also demanded that DTC genetic testing not be offered for specimens originating in the state of New York.²⁹⁰ By 2009, the Secretary’s Advisory Committee on Genetics, Health, and Society (SACGHS),²⁹¹ which operates under the Department of Health

²⁸⁷ See 42 U.S.C. § 263a (2006). The Clinical Laboratory Improvement Amendments (CLIA) of 1988 are United States federal regulatory standards that apply to all clinical laboratory testing performed on humans in the United States. See *Clinical Laboratory Improvement Amendments (CLIA)*, FOOD & DRUG ADMIN., <http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/IVDRegulatoryAssistance/ucm124105.htm> (last visited Jan. 2, 2012). Clinical trials and basic research are exempt from CLIA. *Id.* In connection with the CLIA, the CLIA Program sets standards and issues certificates for clinical laboratory testing. *Id.* CLIA defines a laboratory as “any facility that does laboratory testing on specimens derived from humans to give information for the diagnosis, prevention, treatment of disease, or impairment of, or assessment of health.” *Id.* The CLIA Program is a safeguard of the accuracy, reliability, and timeliness of test results. *Id.* The program model is that regardless of where a test is performed, the standards should produce accurate and precise results across CLIA certified laboratories. *Id.*

²⁸⁸ Alex Soojung-Kim Pang, *Cease-and-Desist Letter Sent to California-Based Personalized Genetics Startups*, FUTURE NOW BLOG (June 19, 2008), <http://www.iftf.org/node/2048>.

²⁸⁹ Emily Singer, *Genetic Testing for Consumers Scrutinized*, TECH. REVIEW (June 23, 2008), http://www.technologyreview.com/prINTER_friendly_article.aspx?id=20995.

²⁹⁰ N.Y. COMP. CODES R. & REGS. tit. 10, § 58-1.7 (2011) (“No establishment other than a clinical laboratory under permit shall accept specimens for the purpose of obtaining information for the diagnosis, prevention, or treatment of a disease or the assessment of a health condition.”).

²⁹¹ The SACGSU charter provides:

Scientific advances in genetics and genomics help provide a better understanding of health and disease and lead to new technologies and tools that are used in research, clinical care, public health, and nonmedical areas such as forensics. To maximize the contributions of genetic and genomic knowledge and technologies to personal and public health requires consideration of their appropriate integration into health promotion and

and Human Services, opened discussions on DTC genetic testing.²⁹² Soon after, the FDA sent letters to and met with representatives of several DTC genetic testing companies. Through those letters and in those meetings, the FDA signaled that it had regulatory authority over DTC testing, but the companies unanimously claimed that they had “laboratory developed test” (LDT) status and, therefore, were beyond the reach of the FDA.²⁹³

These early inquiries into DTC genetic testing represent only a small subset of a much larger discussion that involves issues such as the high price of health care, personalized medicine, and overregulation by “nanny-states.” As discussed in more detail *infra*, the “to regulate or not to regulate” debate has reached a tipping point. As of February 2010, more than thirty companies sell DTC genetic services, mostly through online marketing and

disease prevention and management. In addition, ethical, legal, and social issues raised by genetic and genomic technologies must be considered to avoid the misapplication of emerging technologies or the creation of inequitable access to technologies with known clinical utility.

To consider these issues and concerns, the Secretary’s Advisory Committee on Genetics, Health, and Society was established. This committee will: (1) provide a forum for expert discussion and deliberation and the formulation of advice and recommendations on the range of complex and sensitive issues raised by new scientific and technological developments in human genetics and genomics; (2) assist the Department of Health and Human Services (HHS) and other Federal agencies, at their request, in exploring issues raised by the development and application of genetic and genomic technologies; and (3) make recommendations to the HHS Secretary on how to address such issues.

NAT’L INSTS. OF HEALTH, DEP’T OF HEALTH & HUM. SERVS., CHARTER (2010), *available at* http://oba.od.nih.gov/oba/SACGHS/2010_SACGHS_Charter_Renewal001.pdf. The charter expired on February 28, 2011. *Id.*

²⁹² Dan Vorhaus, *HHS Pulls the Plug on Genetics Advisory Committee*, GENETICS L. REP. (Sept. 23, 2010), <http://www.genomicslawreport.com/index.php/2010/09/23/hhs-pulls-the-plug-on-genetics-advisory-committee/>.

²⁹³ LDTs are defined as “medical tests performed by the laboratory in which the test was developed, and the test is neither FDA-cleared nor FDA-approved.” *Laboratory Developed Test Oversight Should Be Strengthened*, C. AM. PATHOLOGISTS (Sept. 24, 2009), http://www.cap.org/apps/cap.portal?_nfpb=true&cntvwrPtlActionOverride=%2Fportlet%2FcontentViewer%2Fshow&_windowLabel=cntvwrPtl&cntvwrPtlActionForm.contentReference=statements%2Fldt_oversight_statement.html&_state=maximized&_pageLabel=cntvwr. The regulation is superficial at best. The Center for Medicare and Medicaid Services (CMS) currently manages quality assurances through the authority of the CLIA, but the oversight is little to none, thus making it safe territory for DTC genetic tests. *Id.*

sales.²⁹⁴ These tests run the gamut and include: single-disorder tests such as Alzheimer's,²⁹⁵ asthma,²⁹⁶ breast cancer,²⁹⁷ and celiac disease;²⁹⁸ ethnic and hereditary diseases;²⁹⁹ metabolic health assessments;³⁰⁰ multi-level disease predisposition and drug interaction tests;³⁰¹ to an entire genome spectrum.³⁰² The tests range from bargain basement deals (\$99)³⁰³ to the pricey (\$1100)³⁰⁴ to the outrageous (\$4998 per genome for an entire genome map when you order a *minimum* of ten genomes).³⁰⁵ Concerns about the use of DTC genetic testing fluctuate as much as the price. From the purpose of the test to the quality of the laboratory facility to the business model employed by DTC genetic testing companies, regulators, scientists, entrepreneurs, and consumers have much to consider.

2. Test Prep Course

Despite the variation among the price points and products offered, the tests all share two things in common. First, the tests are sold directly to, and the sample collection is performed by, the

²⁹⁴ SEC'Y ADVISORY COMM. ON GENETICS, HEALTH, & SOC'Y, DEP'T OF HEALTH & HUM. SERVS., DIRECT-TO-CONSUMER GENETIC TESTING 5 (2010), *available at* http://oba.od.nih.gov/oba/sacghs/reports/SACGHS_DTC_Report_2010.pdf.

²⁹⁵ GRACEFUL EARTH, <http://www.gracefulearth.com> (last visited Jan. 2, 2012).

²⁹⁶ *Asthma Drug Response Test: β 16AsthmaGEN*, CONSUMER GENETICS, <http://www.consumergenetics.com/DNA-Tests/Asthma-Drug-Response.php> (last visited Jan. 2, 2012).

²⁹⁷ *Inherited Risk for Breast Cancer ('BRCA Gene-Gene Panel')*, MATRIX GENOMICS, <http://www.matrixgenomics.com/resources-breastcancer.php> (last visited Jan. 2, 2012).

²⁹⁸ ENTEROLAB, <http://www.enterolab.com> (last visited Jan. 2, 2012); HEALTHCHECKUSA, <http://www.healthcheckusa.com> (last visited Jan. 2, 2012).

²⁹⁹ FAMILY TREE DNA, <http://www.familytreedna.com> (last visited Jan. 2, 2012).

³⁰⁰ *Metabolic Health Assessment DNA Analysis*, CYGENE DIRECT, <http://cygene.infinityarts.com/browse-10868/Metabolic-Health-Assessment.html> (last visited Jan. 2, 2012).

³⁰¹ *GTL DNA Tests*, GENETIC TESTING LABS., <http://www.gtl dna.com/dnatests.html> (last visited Jan. 2, 2012); EASYDNA, <http://www.easy-dna.com> (last visited Jan. 2, 2012); BIOMARKER PHARM., <http://www.biomarkerinc.com> (last visited Jan. 2, 2012); 23ANDME, *supra* note 1.

³⁰² SEQWRIGHT DNA TECH. SERV., <http://www.seqwright.com> (last visited Jan. 2, 2012).

³⁰³ 23ANDME, *supra* note 1.

³⁰⁴ *Store, Our Products: deCODEme Complete Scan*, DECODE GENETICS, <https://www.decode.me/store> (last visited Jan. 2, 2012).

³⁰⁵ KNOOME, <http://www.knome.com/> (last visited July 20, 2011).

consumer. In many cases a medical provider plays absolutely no role in the process.³⁰⁶ Second, the tests do not purport to make an actual diagnosis. Rather, the results report the presence of genetic variations and attempt to predict (usually in the form of a percentage) the likelihood of developing a disorder related to that variation.³⁰⁷ Where a company calculates the genetic risk for upwards of fifty conditions and traits, the results can lead to both relief and distress, much like a tarot card reading.

Predictive genetic testing that is administered by a physician is no different in this respect. It too delivers a likelihood calculus to express the risk of developing a disease or disorder.³⁰⁸ The differences between tests overseen by a medical provider and DTC genetic tests come in the form of the mechanism of collection, the laboratory process and analysis, and the confidence in the final report.³⁰⁹ Many DTC genetic tests come in the form of a prepackaged kit that contains a tube for saliva collection.³¹⁰ The consumer effectively spits a sizeable amount of saliva (if you can quantify a little vs. a lot of saliva) into the tube, pops the cap on it, seals it into the pre-addressed box, and mails it off to a laboratory which may or may not be the same location as the company offering the DTC genetic testing.³¹¹

Genetic testing in the clinical setting encompasses more than just predictive genetics, however. Clinical genetics tests generally fall into three categories: “predictive, diagnostic, and prenatal.”³¹² At-home genetic tests generally steer clear of the prenatal tests, and instead put their eggs in the predictive basket.³¹³ The

³⁰⁶ See, e.g., websites listed *supra* notes 295-302.

³⁰⁷ *Id.*

³⁰⁸ NUTRITION AND GENOMICS: ISSUES OF ETHICS, LAW, REGULATION, AND COMMUNICATION 91 (David Castle & Nora M. Ries eds., 2009).

³⁰⁹ *Id.*

³¹⁰ See, e.g., *A Peak Inside the 23andMe Package*, AMAR'S BLOG (April 9, 2011), <http://blog.zumkhawala.com/2011/04/peak-inside-23andme-package.html>.

³¹¹ *Id.*

³¹² Gniady, *supra* note 249, at 2441.

³¹³ But see SEQureDx™ technology, a DTC genetic test that relies upon a maternal blood supply and is marketed as a “revolutionary approach to prenatal genetic screening. Rather than harvesting placental tissue cells (as is required for chorionic villus sampling), or entering the uterus to sample the amniotic fluid surrounding the baby (as is done with genetic amniocentesis), this proprietary technology extracts and analyzes DNA material directly from a maternal blood sample. SEQureDx technology utilizes circulating cell-free fetal nucleic acids in maternal plasma to examine

predictive testing model answers a basic question: whether a person has a particular genetic variation known to be related to the development of a particular disorder.³¹⁴ That answer is then translated into a likelihood ratio of actually developing the disorder and then generally compared to the average incidence of that disorder in a larger population.³¹⁵ One person's individual disease risk calculus may or may not factor in family history. Some DTC testing companies have lengthy questionnaires that a consumer is invited to fill out.³¹⁶ Whether that data is used in either the sequencing or the analysis portion of the tests is difficult to ascertain since much of the process is protected as a trade secret.³¹⁷

3. Grading the DTC Genetic Tests

Without a doubt, gene sequencing and genetic analysis are critical components to future scientific discoveries and medical breakthroughs.³¹⁸ Many medical and pharmaceutical research projects require some amount of genetic testing. New drugs and treatment rely on genetics.³¹⁹ Preventative medicine has become more prevalent because of genetic testing.³²⁰ Scientists isolate, probe, and manipulate genes in multiple ways to further our understanding of how our bodies work.³²¹ The difficult part is that using genes to treat health concerns is not as simple as using aspirin to alleviate a fever. Genetics is a complex field. After all,

variances in the genetic material of the fetus, such as aneuploidies." *Fetal Nucleic Acid Technology*, SEQUENOM, <http://www.sequenom.com/home/products---services/diagnostics/prenatal-diagnostics/fetal-nucleic-acid-technology/> (last visited Jan. 2, 2012).

³¹⁴ Gniady, *supra* note 249, at 2441.

³¹⁵ *Id.*

³¹⁶ 23ANDME, *supra* note 1.

³¹⁷ See, e.g., *Terms of Service*, 23ANDME, <https://www.23andme.com/about/tos/?version=1.1> (last visited Jan. 2, 2012).

³¹⁸ Dhavendra Kumar, *Clinical Medicine in the Genome Era: An Introduction*, in *GENOMICS AND CLINICAL MEDICINE* 145, 145 (Dhavendra Kumar & Sir David Weatherall eds., 2008).

³¹⁹ *Id.* at 149 (discussing the emergence of pharmacogenetics—the “study of the role of inherited genetics in individual variation in drug response and toxicity”).

³²⁰ *Id.* (discussing “personalized medicine”).

³²¹ Kumar, *supra* note 318, at 595 (discussing the process of gene isolation and manipulation).

with nearly 25,000 genes making up the lattice work of our genomes, it is easy to get lost amid the twists and turns.

Genetics should be the farthest medicine can get from a “one size fits all” model of care. It has the potential to be the most individualized form of personalized medicine. But as a predictive tool, genetic testing offers what is effectively an educated guess.³²² Although we seek certainty, science cannot yet offer that based on a predictive genetic test.³²³ The disparity between a predictive genetic assessment and an actual diagnosis is often referred to as a “therapeutic gap.” Despite the information that genetic testing provides, in most cases the information does not change the course of treatment until the disorder manifests.³²⁴ Moreover, for DTC testing, few companies offer any sort of genetic counseling once a consumer receives results.³²⁵ Other companies outsource their genetic counseling and charge users a fee.³²⁶ For example, 23andMe’s genetic counseling provision states:

A genetic counselor can help you understand more about your 23andMe reports and respond to your genetic health questions. 23andMe is collaborating with Informed Medical Decisions, Inc., to give you direct access to board-certified counselors that have been specifically trained to guide you through your 23andMe results.³²⁷

Clicking on the link to learn more about 23andMe’s genetic counseling options reveals that it costs at a minimum \$99 to speak with a genetic counselor, and up to \$250 to have *comprehensive* clinical genetic counseling.³²⁸ Query whether such an approach to

³²² See, e.g., Andrew Pollack, *A Blood Test Offers Clues to Longevity*, N.Y. TIMES, May 19, 2011, at B1, available at http://www.nytimes.com/2011/05/19/business/19life.html?_r=2&ref=dnadeoxyribonucleicacid&pagewanted=all (explaining that new genetic tests purporting to give insight into a person’s lifespan cannot specify how many years or months one can expect to live).

³²³ *Id.*

³²⁴ Gniady, *supra* note 249, at 2431.

³²⁵ *Id.* at 2451.

³²⁶ For example, 23andMe outsources its genetic counseling services to Informed Medical Decisions, Inc. 23andMe, INFORMED MED. DECISIONS, <http://informeddna.com/index.php/23andme/schedule-appointment-23.html> (last visited Jan. 2, 2012).

³²⁷ *Pseudocholinesterase Deficiency - Sample Report*, 23ANDME, <https://www.23andme.com/health/Pseudocholinesterase-Deficiency/> (last visited Jan. 2, 2012).

³²⁸ INFORMED MED. DECISIONS, *supra* note 326.

genetic counseling can be successful given that it is telephonic and there is no preexisting medical relationship between the parties.³²⁹ A counselor is limited to the genetic results and whatever information is reported by the consumer. It seems to be more of a profit tool rather than a patient service.

Beyond the emotional and psychological impact, there are even fewer resources available to gauge the reliability of the DTC genetic tests.³³⁰ Accuracy and reliability of genetic testing depends on the related *analytic* and *clinical validity* of the test.³³¹ *Analytic validity* pertains to the test arriving at the “right answer” as to whether a specific gene mutation is present or absent” in that individual.³³² *Clinical validity* builds upon the “right answer” and asks whether that specific “test result correlates with the presence or absence of a specific disease, or heightened risk of disease,” in the individual.³³³ Accuracy and reliability work in tandem in the same manner as analytic and clinical validity. *Accuracy* concerns whether genetic variations are in fact present in that person.³³⁴ *Reliability* is another way of examining precision. In other words, if the genetic test is performed one hundred times, the same genetic variations would be found each time.³³⁵ Measuring accuracy, reliability, and validity (both clinical and analytic) largely depends on the specific mechanics of that test and on the capabilities of the laboratories performing the test.³³⁶ Last, *clinical utility* must also be considered. Does the test have a “positive impact on a patient’s health and wellbeing?”³³⁷ According to the Genetics and Public Policy Center, “Evidence demonstrating utility can take years to establish. The current oversight system does not ensure the analytic or clinical validity or the clinical utility of genetic tests.”³³⁸

³²⁹ Gniady, *supra* note 249, at 2449–51.

³³⁰ *Id.* at 2442.

³³¹ Audrey Huang, *Who Regulates Genetic Tests?*, GENETICS & PUB. POL’Y CTR., http://www.dnapolicy.org/policy.issue.php?action=detail&issuebrief_id=10 (last modified May 30, 2008).

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

Whether there is independent review of a specific DTC genetic test to assess its performance depends on whether the company developed its test as an LDT.³³⁹ As noted earlier, LDT kits are not required to undergo an independent evaluation of their clinical validity.³⁴⁰ It falls to the individual laboratory director to determine whether to offer a test for review.³⁴¹ That means few, if any, DTC genetic tests have undergone an independent review to assess accuracy, reliability, and validity.³⁴² Furthermore, the laboratories that perform the analysis may fall below the radar and go unchecked for safety, contamination, and methodology issues.³⁴³ The foregoing does not even touch upon the mathematical algorithms and population genetics the various DTC companies use to arrive at their results.³⁴⁴ Consequently, these tests contain a massive amount of information. How useful and accurate that information is remains to be seen.³⁴⁵

4. Mean Genes: What Your Genes Say About You When You're Not Around

Popular culture portrays genetics as an omniscient and omnipotent force of nature.³⁴⁶ Indeed, television programming is saturated with crime and medical dramas where the lynchpin to cracking a case or determining a diagnosis is housed in DNA.³⁴⁷ The movie *Gattaca*—named for the first letters of the nucleobases that form the basic building blocks of DNA—depicted a society beholden to a future predetermined by one's DNA. The test of a single drop of blood forever set a person's destiny; the course could not be altered.³⁴⁸ Genetics even made its way into song and dance. The 2008 comedy-horror-musical movie titled *Repo! The Genetic*

³³⁹ *Id.*

³⁴⁰ See discussion *supra* note 293.

³⁴¹ Huang, *supra* note 331.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ Gregory M. Lamb, *How Reliable is Personal DNA Testing?*, CTR. FOR GENETICS & SOC'Y (Sept. 15, 2010), <http://www.geneticsandsociety.org/article.php?id=5372>.

³⁴⁵ *Id.*

³⁴⁶ Jessica D. Gabel, *Forensiphilia: Is Public Fascination With Forensic Science a Love Affair or Fatal Attraction?*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 233, 243 (2010).

³⁴⁷ *Id.* at 240.

³⁴⁸ *Id.*

Opera featured an organ-financing program structured in the same manner one would find a standard car loan.³⁴⁹ The repossession clause (i.e., reclaim the organ for nonpayment) proved fatal.³⁵⁰

The point here is that genetics has become an almost ubiquitous feature of modern life. Despite the advanced and technical aspects of the science, more and more people feel comfortable with the concept that genes and DNA play a role in many different facets of our lives.³⁵¹ Skepticism has been replaced with complacency, and the lay public—future consumers and patients—generally have a positive view of genetics.³⁵² A 2005 survey revealed that seventy-two percent of women aged eighteen to seventy-four consider genetics to be one of the key causes of cancer.³⁵³ The study's authors suggested that this uniform endorsement of the significance of genetics in causing disease (to the exclusion of environmental and lifestyle choices) may demonstrate that people might give undeserved credence to the role that genes play in disease causation.³⁵⁴

Unfortunately, genetic perception and genetic literacy are not mutually inclusive concepts. Although various public interest organizations attempt to raise the level of genetic education, the efforts often lose out to the constant stream and sensationalism of the twenty-four-hour news cycle, hand-wringing blog postings, and entertainment offerings. One could imagine a reality game show where contestants must use genetic information to piece together who else in the confined but posh living quarters they are related to. Another program might take its cue from shows like *Intervention* and *Hoarders* and depict someone who learns that she has the gene that causes an inevitably fatal disease and

³⁴⁹ See *Repo! The Genetic Opera*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0963194/> (last visited Jan. 2, 2012).

³⁵⁰ *Id.*

³⁵¹ Kiley Ariail, Carolyn Cindy Watts & Deborah J Bowen, *Retention in a Breast Cancer Risk Information Trial: Motivations of a Population-Based Sample of Women*, 33 HEALTH EDUC. & BEHAV. 591-603 (2006).

³⁵² Tania M. Bubela & Timothy A. Caulfield, *Do the Print Media "Hype" Genetic Research? A Comparison of Newspaper Stories and Peer-Reviewed Research Papers*, 170 CAN. MED. ASS'N. J. 1399 (2004).

³⁵³ *Id.*

³⁵⁴ *Id.* at 1403-04.

proceeds to document her personal “Bucket List”³⁵⁵ and preparations for death.

Thus, the “war” between information and entertainment can increase the potential for misunderstanding the possibilities and limitations of genetics. To fill the gaps, people now turn to the internet to do research. A Google search for “genetic testing” immediately results in three advertisements at the top of the screen.³⁵⁶ Each one is a DTC genetic test.³⁵⁷ What also pops up is a 2008 *Time Magazine* article heralding DTC genetic testing as the “best invention” of the year.³⁵⁸ What consumer would distrust the esteemed editors of *Time*? In fact, flipping through the pages of most popular magazines, consumers will find the pages littered with various advertisements for pharmaceutical products. The fine print is accurate (indications and side effects), but the photos and bold words are intended to convey positive and promising messages to consumers.

The “get better” mentality is what brings consumers to pharmaceutical products, and demand drives profit. Similarly, tag lines from DTC companies send the same messages to their consumers: “Gene-ius. A smart way to look at your health;”³⁵⁹ “Start filling in the gaps with your DNA;”³⁶⁰ “From DNA to Discovery;”³⁶¹ “deCODE your health, Calculate genetic risk—Empower prevention: your genes are a road-map to better health.”³⁶² Of course, the purpose of advertising is to bring

³⁵⁵ A bucket list is a “list of things you want to do before you die.” *Bucket List Definition*, URBANDICTIONARY.COM, <http://www.urbandictionary.com/define.php?term=bucket%20list> (last visited Jan. 2, 2012).

³⁵⁶ *Genetic Testing – Google Search*, GOOGLE, <http://www.google.com/search?q=genetic+testing&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a> (last visited Jan. 2, 2012).

³⁵⁷ GENETIC TESTING LABS., <http://www.gtldna.net> (last visited Jan. 2, 2012); THE PATERNITY DOCTOR, <http://www.thepaternitydoctor.com> (last visited Jan. 2, 2012); 23ANDME, *supra* note 1.

³⁵⁸ Anita Hamilton, *Best Inventions of 2008: The Retail DNA Test*, TIME SPECIALS (Oct. 29, 2008), http://www.time.com/time/specials/packages/article/0,28804,1852747_1854493_1854113,00.html.

³⁵⁹ NAVIGENICS, <http://www.navigenics.com/> (last visited Jan. 2, 2012).

³⁶⁰ 23ANDME, *supra* note 1.

³⁶¹ *Knome Awards Human Exome Sequencing and Analysis to Biomedical Researchers*, KNOME (Oct. 5, 2010), <http://knome.com/2010/10/knome-awards-human-exome-sequencing-and-analysis-to-biomedical-researchers/>.

³⁶² DECODE GENETICS, <http://www.decodeme.com/> (last visited Jan. 2, 2012).

consumers to a product, and thus companies focus on their strengths and not their limitations. No DTC genetic company in its right mind would use a slogan like: “Scare Yourself Silly with Our Semi-Reliable Genome Scoping.” Nonetheless, because our genetic composition will almost always have both positive and negative aspects, the promises of the testing should incorporate a dose of objectivity and education.³⁶³

B. Benefits of DTC Genetic Tests

Knowledge itself is power.³⁶⁴ Genetic testing can dramatically affect the way we lead our lives. Genetic testing for certain diseases can predict or even diagnose disease and correspondingly alter treatment and therapy options.³⁶⁵ Certain clinical genetic tests have already demonstrated this. For example, if a woman elects to take the Comprehensive BRCAAnalysis test (which identifies mutations in the BRCA1 and BRCA2 genes associated with hereditary breast and ovarian cancer) and receives positive results, she has several treatment alternatives.³⁶⁶ These options range from the less invasive (a wait and see approach or increased surveillance) to the more involved (chemoprevention) to the preemptive strike (preventative mastectomy or oophorectomy).³⁶⁷ In those cases, some patients feel that it is better to act sooner rather than later.

The potential advantages of DTC genetic testing seem less concrete. There are intangible benefits: “convenience, increased

³⁶³ The U.S. Federal Trade Commission has the authority to investigate any advertising claims and take action should it find the claims to be false or misleading. Depending on the company, DTC advertising may or may not include all relevant information regarding capabilities and limitations of the tests, and contain a statement referring patients to qualified health providers or genetic counselors to obtain further information. As it stands now, the FTC seems to be reluctant or otherwise occupied, and it has not flexed its regulatory authority to reign in DTC advertising. See *Advertising FAQ's: A Guide for Small Business*, BUREAU OF CONSUMER PROT. BUS. CTR., <http://business.ftc.gov/documents/bus35-advertising-faqs-guide-small-business> (last visited Jan. 2, 2012).

³⁶⁴ FRANCIS BACON, *MEDITATIONS SACRAE AND HUMAN PHILOSOPHY* 71 (Kessinger Publ'g 2005) (1597).

³⁶⁵ See, e.g., *Genetic Testing*, KIDSHHEALTH, <http://kidsheath.org/parent/system/medical/genetics.html> (last visited Jan. 2, 2012).

³⁶⁶ *Positive: What Should I do Now?*, BRACANALYSIS, <http://www.bracanow.com/understanding-my-results/positive-do-now.php> (last visited Jan. 2, 2012).

³⁶⁷ *Id.*

access to testing, consumer autonomy, and individual empowerment.”³⁶⁸ Information from DTC genetic tests may encourage consumers to take responsibility for their health, and prompt them to implement healthy lifestyle choices.³⁶⁹ In addition, for those consumers who have some fear of seeking medical guidance, a DTC test might be a non-intimidating first step in connecting with the medical community and opening the door sooner rather than later.³⁷⁰ These benefits represent a more holistic approach to one’s health, lifestyle, and wellbeing as opposed to treating specific disorders and illnesses.³⁷¹

As noted earlier, clinical genetic tests that reveal the possibility of developing a specific disorder might cause that person to monitor the appearance of related symptoms.³⁷² Family members might be prompted to be tested as well, and potential parents might get screened to determine if they are carriers for certain diseases.³⁷³ In addition, negative test results can reassure individuals that they are, at least, not genetically susceptible to a specific illness. These benefits, however, are currently limited to clinical genetic tests. DTC testing may offer a prediction, but the lack of regulation and laboratory standards detracts from the clinical value.³⁷⁴

DTC genetic testing might also provide a private health preview for consumers who might be concerned about genetic discrimination.³⁷⁵ The Genetic Information Nondiscrimination Act of 2008 (GINA) is intended to provide federal protection against genetic discrimination in both the insurance and workplace settings.³⁷⁶ GINA, however, is limited in scope. Its protections do not cover life insurance or long-term health care, and individuals

³⁶⁸ DIRECT-TO-CONSUMER GENETIC TESTING, *supra* note 294, at 6.

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ Bridget M. Kuehn, *Risks and Benefits of Direct-to-Consumer Genetic Testing Remain Unclear*, 300 JAMA 1503, 1503 (2008).

³⁷² DIRECT-TO-CONSUMER GENETIC TESTING, *supra* note 294, at 6.

³⁷³ See KIDSHEALTH, *supra* note 365 (“[Genetic Tests] determine whether you, your partner, or your baby carry genes for certain inherited disorders.”).

³⁷⁴ Kuehn, *supra* note 371, at 1504.

³⁷⁵ DIRECT-TO-CONSUMER GENETIC TESTING, *supra* note 294, at 6.

³⁷⁶ *Breaking News: GINA Becomes Law May 2008*, HUM. GENOME PROJECT INFO., http://www.ornl.gov/sci/techresources/Human_Genome/elsi/legislat.shtml (last visited Jan. 2, 2012).

might want to gauge their relative genetic risk factors before seeking the clinical confirmation.³⁷⁷

C. With Benefits Come Burdens . . . and Concern

Information is not knowledge.³⁷⁸ DTC genetic tests offer a glimpse into your DNA, but they lack the quantifiable value of the clinical genetic tests.³⁷⁹ Currently, there is little research on consumers' satisfaction with DTC genomic tests.³⁸⁰ Concerns about DTC genetic testing seem to vary substantially. The purpose of the test, laboratory quality controls, and the business model of the company offering the test all represent chief concerns among scientists and regulators.³⁸¹ There is also a certain amount of uneasiness as to whether genetic testing causes social, emotional, or psychological harm either directly or indirectly.³⁸²

1. Purpose and Manner of the Test

DTC predictive tests may be very large in scope. They might also be narrowed to just one disease.³⁸³ The severity of the disorder and the gravity of the information being relayed are factors that play an important role to regulators. A test to determine if a person may carry the gene believed to influence the development of cystic fibrosis may raise "few red flags" if the test is conducted by a properly certified laboratory and the company utilizes "credentialed genetic professionals" to discuss the results with the customers.³⁸⁴ On the other hand, if a company tests for everything from sensitivity of smell to IQ to Alzheimer's disease and provides the bare minimum information about the genetic

³⁷⁷ *Id.*

³⁷⁸ *Albert Einstein Quotes*, QUOTE ARCHIVE, <http://www.evula.com/quotes/einstein.php> (last visited Jan. 2, 2012).

³⁷⁹ Karen Norrgard, *DTC Genetic Testing for Diabetes, Breast Cancer, Heart Disease and Paternity*, SCITABLE (2008), <http://www.nature.com/scitable/topicpage/dtc-genetic-testing-for-diabetes-breast-cancer-698>.

³⁸⁰ DIRECT-TO-CONSUMER GENETIC TESTING, *supra* note 294, at 10.

³⁸¹ *Id.* at 6.

³⁸² *Id.* at 8-9.

³⁸³ *Id.* at 5.

³⁸⁴ *Id.* at 6.

variants or DNA regions being analyzed, then it might “provoke outcries from the medical community.”³⁸⁵

Genetic tests and the interpretation of their results can fluctuate in their quality, and it can be difficult for consumers to discern the differences.³⁸⁶ There is a potential for predictions to be exaggerated, and results may imply a confidence and level of accuracy that is simply unsubstantiated.³⁸⁷ While the DTC genetic tests purport to be risk assessments, that label is challenging to characterize given the variety of contextual applications. Some tests fail to report the results in terms of understandable levels of specificity, sensitivity, and confidence.³⁸⁸ A statistical estimate can be confusing to the average person (consider the DNA statistics offered at the O.J. Simpson trial).³⁸⁹ Although this type of testing can be informative, without the proper knowledge to interpret and put it into the context, the results can be deceiving.

Receiving a statistical predictor or even a generic statement of risk (such “above average risk”) makes the likelihood of disease hard to quantify for a consumer.³⁹⁰ A risk is simply that—something that may or may not happen. But when delivered in the confines of a medical statement such as “you have a 13% risk of developing Alzheimer’s disease,” what exactly should a consumer take away from that missive? Does it mean that thirteen out of one hundred times your memory will be wiped away in your old age? Can that number change? To whom is the thirteen percent relative to? Is it along ethnicity or racial lines? Gender? Age? Does thirteen percent make Alzheimer’s a remote possibility or a foregone conclusion? When results are dropped on someone by

³⁸⁵ *Id.*

³⁸⁶ JEREMY GRUBER, COMMENTARY, MOLECULAR AND CLINICAL GENETICS PANEL OF THE MEDICAL DEVICES ADVISORY COMMITTEE ON DIRECT TO CONSUMER GENETIC TESTS 2 (Mar. 8-9, 2011), *available at* <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/MedicalDevices/MedicalDevicesAdvisoryCommittee/MolecularandClinicalGeneticsPanel/UCM248557.pdf>.

³⁸⁷ *Id.* at 3.

³⁸⁸ *Id.* at 5.

³⁸⁹ ACLA, COMMENTARY, MOLECULAR AND CLINICAL GENETICS PANEL OF THE MEDICAL DEVICES ADVISORY COMMITTEE ON DIRECT TO CONSUMER GENETIC TESTS (Mar. 8, 2011), *available at* <http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/MedicalDevices/MedicalDevicesAdvisoryCommittee/MolecularandClinicalGeneticsPanel/ucm245447.htm> [hereinafter ACLA COMMENT].

³⁹⁰ *Id.*

email or online account, the *personalized* level of medicine suddenly becomes just a medical bar code. As a result, some consumers might find themselves confused and frightened due to a lack of communication from the company (and corresponding misunderstanding) of the meaning or relative significance of the test results. The American Clinical Laboratory Association (ACLA) believes that these “unintended consequences can be minimized when appropriate medical personnel are involved in the test ordering, reporting and consultation, as appropriate.”³⁹¹

Some of the more reputable DTC testing companies do a “decent job” of informing the consumer of what and where along a DNA strand they are testing.³⁹² But as the Council for Responsible Genetics points out, these companies are stuck between a rock and a hard place as “they attempt to market their services while at the same time communicating the current limitations of what we can learn from genetic information.”³⁹³ While companies routinely proclaim that these tests do not offer medical advice, what is said can be very different from what is heard. The result “you have a 13% risk of developing Alzheimer’s disease,” certainly sounds like medical advice. Overstating the significance of genetic results, especially for tests that lack a level of reliability or standardization set by a professional genetics association might be no different than throwing darts at a target to determine the predictive risk of developing a disease.³⁹⁴

2. Quality Controls in the Laboratories

Both CLIA and state agencies regulate clinical laboratories.³⁹⁵ In addition, ACLA has instituted certain safeguards and requirements for its member laboratories, “including the requirement that its members gain accreditation by an independent, CLIA recognized organization.”³⁹⁶ DTC companies are not independently regulated by CLIA—although

³⁹¹ *Id.*

³⁹² GRUBER, *supra* note 386, at 3.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ Rebecca Antar Novick, *One Step at a Time: Ethical Barriers to Home Genetic Testing and Why the U.S. Health Care System is not Ready*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 621, 630 (2008).

³⁹⁶ ACLA COMMENT, *supra* note 389.

some critics have called for such regulation.³⁹⁷ The American Society on Human Genetics has called for the development of “detailed national standards for genetic tests” and that labs that perform genetic tests should be assessed on the basis of these standards.³⁹⁸ This dovetails into concerns over sample switching and contamination.

In reality, all medical testing is vulnerable to the possibility for laboratory errors, yet we as patients would like to believe that it does not happen (unless we get bad news). Laboratory errors can be the result of one or several factors, such as the misidentification or contamination of the chemicals used for testing.³⁹⁹ Of course, mistakes happen. Over the past decade, lab errors have occurred at numerous state, federal, and military crime labs and have included the mishandling and contamination of DNA samples.⁴⁰⁰ As DNA became a routine part of criminal investigations and prosecutions, the public has been lulled into accepting the notion that forensic DNA testing is infallible.⁴⁰¹ It is only logical that this trust would carry over into genetic testing. But mistakes in genetic testing are just as likely, if not more. Forensic DNA testing has become a very standardized process and most laboratories use the same standards, methods, and equipment to extract, test, and analyze DNA.⁴⁰² This standardization has yet to be replicated on the DTC genetic testing side. Just as mistakes in a forensic crime lab can have far reaching implications, so too can errors in DTC labs.

In June 2010, 23andMe reported that “a number of new 23andMe customer samples were incorrectly processed” by its

³⁹⁷ Gniady, *supra* note 249, at 2436-37.

³⁹⁸ AMERICAN SOCIETY FOR HUMAN GENETICS, COMMENTARY, MOLECULAR AND CLINICAL GENETICS PANEL OF THE MEDICAL DEVICES ADVISORY COMMITTEE ON DIRECT TO CONSUMER GENETIC TESTS (March 7, 2011), *available at* <http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/MedicalDevices/MedicalDevicesAdvisoryCommittee/MolecularandClinicalGeneticsPanel/ucm245447.htm>.

³⁹⁹ See William C. Thompson, *Tarnish on the “Gold Standard”: Recent Problems in Forensic DNA Testing*, CHAMPION 10 (Jan.-Feb. 2010), *available at* <http://www.nacdl.org/champion.aspx?id=1537>.

⁴⁰⁰ *Id.*

⁴⁰¹ Gabel, *supra* note 346, at 251.

⁴⁰² Thompson, *supra* note 399 (describing forensic DNA as the “gold standard of forensic science”).

third-party laboratory that actually performs the tests.⁴⁰³ In its press release, the company acknowledged that as many as ninety-six people received test results that were not their genetic profiles.⁴⁰⁴ One of the distressed consumers posted her concerns on the 23andMe message board. The tests results indicated that her son had hemochromatosis⁴⁰⁵ despite the fact that she and her husband were not carriers for the disease.⁴⁰⁶ Whether misplaced or not, this woman worried that perhaps her son had been switched at birth with another baby at the hospital.⁴⁰⁷

This mix up does little to allay concerns that DTC companies use unreliable laboratories that operate outside the reach of regulators. In its remedial statement, 23andMe pledged to put "additional procedures in place that will add an extra layer of safeguards."⁴⁰⁸ The company also stated that it was considering a fully automated process, which would remove the possibility of human error.⁴⁰⁹ Of course, it still takes a human to insert samples into and operate the machine, but clearly, that is beside the point. Perhaps it is not a coincidence that a mere two days after 23andMe publicly acknowledged the lab error, the FDA informed the company that its 23andMe Personal Genome Service qualified as a medical device under the federal Food, Drug, and Cosmetic Act, making it subject to regulation by the FDA.⁴¹⁰ However innocent and "it could happen to anybody" in nature the error may have been, 23andMe's carelessness provides more impetus for stringent regulation and, perhaps, government intervention.⁴¹¹

⁴⁰³ Amar Toor, *23andMe's DNA Mixup Leaves 96 Customers With Wrong Test Results*, SWITCHED (June 8, 2010, 12:45 PM), <http://www.switched.com/2010/06/08/23andmes-dna-mixup-leaves-96-customers-with-wrong-test-results/print>.

⁴⁰⁴ *Id.*

⁴⁰⁵ Hemochromatosis is the abnormal accumulation of iron in certain organs that lead to organ toxicity. It is one of the most common genetic diseases in the United States. *Hemochromatosis*, MEDLINEPLUS, <http://www.nlm.nih.gov/medlineplus/hemochromatosis.html> (last visited Jan. 2, 2012).

⁴⁰⁶ Toor, *supra* note 403.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ Letter from the FDA to Ann Wojicki (June 10, 2010), *available at* <http://www.fda.gov/downloads/MedicalDevices/ResourcesforYou/Industry/UCM215240.pdf>.

⁴¹¹ *Id.*

3. The DTC Business Model

A primary concern with the DTC business model is that it purposely lacks the medical advice component. Genetic testing provides a snapshot of information about a person's health.⁴¹² It does not make connections between family medical history, lifestyle choices, and environmental factors that may also affect a person's risk of developing many disorders.⁴¹³ A discussion about the whole picture of health is something that ordinarily occurs between doctor, patient, and possible genetic counselor. With many companies, these additional factors are not—and to some extent cannot—be addressed by DTC genetic tests.

Many of the companies that offer DTC genetic tests provide the results via a secured internet account that the consumer sets up upon ordering the test.⁴¹⁴ Thus, all results are delivered in a rather robotic fashion where the consumer clicks from link to link to reveal their genetic information.⁴¹⁵ This online format is perhaps the easiest way to provide the results along with detailed studies and the standard “for more information, click here” link. Otherwise, companies that test for a broad range of information would have to send a consumer a volume of material that is impossibly thick. While these accounts are no doubt secure, they are not impervious to being hacked by some third party. When credit card companies reveal that accounts have been breached by a sinister criminal, we worry about whether someone will charge a tank of gas or a trip to Puerto Rico. Those problems are just a matter of numbers and can be readily repaired. But if your account with a DTC company is compromised, suddenly there is a massive amount of private information in the hands of an unintended recipient.⁴¹⁶ Yet consumers would probably be more concerned about who is taking their money and what it is being used for than having their genetic information on the loose. For

⁴¹² GREGORY J. WALTERS, HUMAN RIGHTS IN AN INFORMATION AGE: A PHILOSOPHICAL ANALYSIS 155 (2001).

⁴¹³ *Id.*

⁴¹⁴ See, e.g., 23ANDME, *supra* note 1.

⁴¹⁵ *Id.*

⁴¹⁶ See discussion *infra* Section IV.A. (explaining the extensive surveys one such company asks its customers to participate in as part of the process).

some people, it may not matter much whether genetic information is public or private. But for others, it is a very real concern.

Setting security issues aside as perhaps a minor concern, another problem is the genetic social networking that some DTC companies offer. Consumers who have similar genetic profiles can interact with each other. With some DTC genetic tests, consumers must affirmatively opt-out of being included within that social networking community and the larger research projects carried out by the companies. Not surprisingly, the terms and conditions related to sharing of information are buried in fine print on a crowded webpage.⁴¹⁷ 23andMe offers its “Relative Finder” that allows customers to reach out and touch the branches of his or her family tree.⁴¹⁸ The company proclaims that Relative Finder can find kin “on any branch of your tree,” and that, as a 23andMe member, “you will likely find over 100 relatives, depending on your ancestry.”⁴¹⁹ The company also contends that those customers with Ashkenazi Jewish ancestry “might find well over a thousand relatives.”⁴²⁰ When 23andMe launched this service, it stated (somewhat with tongue-in-cheek) that Relative Finder allows customers to “discover more about your ancestry than you ever thought possible! . . . After all, you never know who you might find.”⁴²¹

The relative stalking feature gives information about your genetic commonalities to other persons who share them. Many of these “relatives” fall into the cousin category and labeled as “3rd to 6th Cousin” or “3rd to Distant Cousin.”⁴²² How related they are seems to be a subjective assessment determined by 23andMe. The perils of Facebook faux pas have been widely chronicled by the

⁴¹⁷ *Terms of Service*, 23ANDME, <https://www.23andme.com/about/tos/> (last visited Jan. 2, 2012).

⁴¹⁸ *Ancestry*, 23ANDME, <https://www.23andme.com/ancestry/relfinder/> (last visited Jan. 2, 2012).

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ Lawrence Hon, *Introducing Relative Finder: The Newest Feature from 23andMe*, SPITTOON (Nov. 19, 2009, 5:13 PM), available at <http://spittoon.23andme.com/2009/11/19/introducing-relative-finder-the-newest-feature-from-23andme/>.

⁴²² *Id.*

media.⁴²³ Facebook has become a breeding ground for bullying, rumor-mongering, and poor judgment. As more people become members of the genetic social networks offered by some DTC companies, it would not be hard to imagine similar antics taking place.⁴²⁴

4. The Harm Factor

In my view, the harm factor involves both direct and indirect effects of genetic testing. The direct effects concern the impact on a person's health and *individual* health-related decisions subsequent to receiving test results. The indirect effects involve ethical issues surrounding genetic testing. Some critics liken DTC genetic testing to arming an untrained consumer with a loaded weapon.⁴²⁵ This is an exaggeration. For years, the medical community has preached that patients should take the lead in observing and reporting their health concerns to their doctors.⁴²⁶ The argument can be made that DTC genetic testing is part of that picture (assuming the patient discusses it with his or her doctor).

The indirect effects that function more like ticking time bombs relate to the effects on family members. Some DTC companies report "carrier status" for certain diseases that may be passed on to offspring. A couple may choose not to have children if it is determined that they both carry the genes that depending on how they were inherited would leave a child with a debilitating disease.⁴²⁷ In addition, individuals who are adopted (and do not know it) or the product of donated eggs and/or sperm may unknowingly discover this through genetic testing. The social networking and "Relative Finder" features may cause this person to stumble upon relatives that do not want to be found or that the

⁴²³ See, e.g., *25 Common Facebook Faux Pas that College Students Make*, ONLINECOLLEGE.ORG (July 19, 2010), <http://www.onlinecollege.org/2010/07/19/25-common-facebook-faux-pas-that-college-students-make/>.

⁴²⁴ DIRECT-TO-CONSUMER GENETIC TESTING, *supra* note 294, at 35-36.

⁴²⁵ Geoffrey S. Ginsburg, *Controversies in Medicine: Direct-to-Consumer Genetic Testing*, DUKEHEALTH.ORG (June 18, 2010), http://www.dukehealth.org/health_library/health_articles/controversies_in_medicine_direct_to_consumer_genetic_testing/.

⁴²⁶ *Id.*

⁴²⁷ *Id.*

person does not want to find. It may also unrealistically raise hopes of someone who is seeking to find biological relatives.

There is also a concern with what I euphemistically term “Ninja DNA.” While some DTC companies seek saliva samples that require an involved and deliberate process of producing a substantial amount of spit in a tube, other companies need a much smaller biological sample—saliva or otherwise. For these tests (think paternity), a crafty person could surreptitiously obtain a biological sample, submit it to the company, and receive the results without ever involving the actual source of the DNA.⁴²⁸ The companies do not require proof of identity nor do they require that the person submitting the sample is in fact the source of that sample.⁴²⁹ Simply put, there is room for exploitation of vulnerable individuals.

In terms of direct harm, DTC-testing skeptics worry that without the benefit or guidance of a medical professional, consumers could misinterpret the results and take unnecessary and harmful actions (e.g., foregoing more traditional tests such as colonoscopy or mammograms if results are negative).

IV. NO DARK SARCASM IN THE LABORATORY: REGULATING THE GENETIC GROUPON

There are multiple federal agencies, federal laws, state regulators, and state laws that cover DTC genetic testing. As a result, the convoluted swamp of patchwork regulations is a steaming hot mess. Heading up the federal team, the Centers for Medicare and Medicaid Services (CMS) regulate laboratory testing under the Clinical Laboratory Improvement Amendments of 1988 (CLIA).⁴³⁰ As detailed above, CLIA covers *all* laboratories that conduct testing on human specimens for the purposes of diagnosis

⁴²⁸ Eriq Gardner, *Gene Swipe: Few DNA Labs Know Whether Chromosomes are Yours or if You Stole Them*, A.B.A. J., Aug. 2011, at 50, 54, available at http://www.abajournal.com/magazine/article/gene_swipe_few_dna_labs_know_whether_chromosomes_are_yours_or_if_you_stole/.

⁴²⁹ *Id.*

⁴³⁰ The Centers for Disease Control and Prevention (CDC) shares some of CMS's laboratory authority through the Clinical Laboratory Improvement Advisory Committee (CLIAC). CLIAC's charter authorizes the committee to advise the CDC, FDA, HHS, and CMS as to any revisions necessary to carry out the mandate of CLIA. Novick, *supra* note 395, at 629.

and treatment.⁴³¹ A laboratory that falls under CLIA's purview must be issued a federal certificate in order to perform clinical laboratory tests.⁴³² CLIA laboratory tests fall into three broad categories: waived, moderate complexity, or high complexity.⁴³³ As the labels indicate, these tests are scored according to the simplistic (waived) or advanced technical nature (high complexity) of the test.⁴³⁴ Those that fall in between qualify as tests of "moderate complexity."⁴³⁵ Facilities that perform moderate to high complexity tests are required to undergo regular inspection, registration, quality assurance checks, and proficiency testing (i.e., clinical validity).⁴³⁶

The CDC adds its input through CLIA recommendations and also sponsors the Evaluation of Genomic Applications in Practice and Prevention (EGAPP) program.⁴³⁷ EGAPP's role is not so much regulatory as it is advisory. The program seeks to establish and assess a "systematic, evidence-based process for evaluating genetic tests that are in transition from research to clinical and public health practice."⁴³⁸ EGAPP examines the validity and utility of specific genetic tests and makes recommendations thereupon. Laboratories, test manufacturers, and research facilities, however, are not bound by these recommendations and guidelines.⁴³⁹ Rather, they may simply inform and influence lab practices. Unfortunately, information is not oversight.

In addition to the CMS/CLIA oversight and CDC aspirations, the FDA has a dog in this fight.⁴⁴⁰ Under the Food, Drug, and Cosmetic Act (FDCA), the FDA regulates *any* test that qualifies as an "in vitro diagnostic device" (IVD), a term that essentially means a freestanding product used in the diagnosis of a disease or

⁴³¹ *Id.* at 624-25.

⁴³² *Id.* at 625.

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.* at 626.

⁴³⁶ *Id.*

⁴³⁷ *Fact Sheet*, OFF. OF PUB. HEALTH GENOMICS, available at http://www.cdc.gov/ostlts/hop/pdfs/OPHG_Factsheet.pdf.

⁴³⁸ *Id.*

⁴³⁹ See EVALUATION OF GENOMIC APPLICATIONS IN PRACTICE AND PREVENTION (EGAPP), <http://www.egappreviews.org/> (last visited Jan. 2, 2012).

⁴⁴⁰ *Id.*

medical condition.⁴⁴¹ DTC genetic testing companies circumvent this definition in two ways: first, by couching their tests as predictive and *non*-diagnostic; and, second, by utilizing so-called “home brew” tests (LDTs) developed internally by their laboratories and commercially sold as a laboratory service rather than as freestanding test kits.⁴⁴² If the DTC genetic tests qualified instead as IVDs, then the FDA would have the authority to regulate those devices.⁴⁴³

At the risk of inviting acronym fatigue, the party here would not be complete without the Federal Trade Commission (FTC). In short, the FTC operates as the advertising police of the federal government. It also oversees various consumer protection laws, and generally has authority to crack down on unfair or deceptive commercial practices.⁴⁴⁴ Despite its clear authority to crack down on any exaggerated claims made by DTC genetic testing companies, the FTC has, for the most part, been hands-off.⁴⁴⁵ Whether it is a matter of inter-agency territorial disputes or some other gap in federal oversight, the FTC remains a mostly silent partner in *enforcing* regulations related to DTC genetic testing.

Despite its relative silence on the enforcement end, the FTC has published guidelines for consumers considering an at-home genetic test.⁴⁴⁶ Among its recommendations, consumers should first discuss the test with a healthcare practitioner as to whether the test should be taken and should then review the results with a doctor or genetic counselor.⁴⁴⁷ The FTC ominously states: “Genetic test results can be complex and serious. You don’t want to make any decisions based on incomplete, inaccurate, or misunderstood information.”⁴⁴⁸ The FTC also advises consumers to “understand

⁴⁴¹ GENETICS & PUB. POL’Y CTR., REPRODUCTIVE GENETIC TESTING: ISSUES AND OPTIONS FOR POLICY MAKERS 31 (2004), *available at* <http://www.dnapolicy.org/images/reportpdfs/ReproGenTestIssuesOptions.pdf>.

⁴⁴² *Diagnostic Kits- Glossary: Abbreviations*, BERKMAN, http://cyber.law.harvard.edu/commonsbasedresearch/Diagnostic_Kits/Glossary (last visited Jan. 2, 2012).

⁴⁴³ GENETICS & PUB. POL’Y CTR., *supra* note 441.

⁴⁴⁴ Gniady, *supra* note 249, at 2452-53.

⁴⁴⁵ The FTC did, however, join the consumer warning published by the FDA and CDC regarding the nutrigenetic tests in 2006. *See* AT-HOME GENETIC TESTS, *supra* note 280.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

the benefits and limits of any test before you buy it—or take it”⁴⁴⁹ (Query where that information will come from since the company may not provide it, and, if they do, it may not be delivered in any decipherable manner.). Voicing the aforementioned concerns over security and privacy,⁴⁵⁰ the FTC warns consumers that they need to protect their privacy, especially if the company posts patient tests results online.⁴⁵¹ Beyond security breach issues, the FTC is justly concerned over *how* companies use consumer’s personal information either for the company’s own research agenda or to share with marketers.⁴⁵² Finally, if the consumer has not been deterred, the FTC drives the last nail in the coffin by recommending “that consumers avoid home tests unless under a physician’s supervision.”⁴⁵³ After all, “most *other* home-use medical tests” have been reviewed by the FDA “to provide a reasonable assurance of their safety and effectiveness.”⁴⁵⁴ The same cannot be said of at-home genetic tests, and the “FDA has not evaluated the accuracy of their claims.”⁴⁵⁵

Rounding out the regulation jumble are state laws that regulate labs and occasionally testing standards. Some state health agencies, particularly state public health entities, regulate the licensing, certification, and accreditation of laboratory personnel and facilities, including some that perform genetic tests.⁴⁵⁶ Although most state regulatory bodies employ the CLIA standards with no added flair, a few states go above and beyond the requirement.⁴⁵⁷ In addition to laboratory oversight, some state laws specifically apply to direct-to-consumer genetic testing. The laws form a hodgepodge collection of limitations or prohibitions on DTC testing; some expressly include genetic testing, while others

⁴⁴⁹ *Id.*

⁴⁵⁰ See discussion *supra* Section III.C.3.

⁴⁵¹ AT-HOME GENETIC TESTS, *supra* note 280.

⁴⁵² *Id.*

⁴⁵³ Novick, *supra* note 395, at 630 (emphasis added).

⁴⁵⁴ AT-HOME GENETIC TESTS, *supra* note 280.

⁴⁵⁵ *Id.*

⁴⁵⁶ Novick, *supra* note 395, at 630.

⁴⁵⁷ Two states—New York and Washington—are exempt from the CLIA requirements because their regulations and requirements for laboratory certification are more stringent than the CLIA federal standards. *Id.*

do not.⁴⁵⁸ Some states authorize laboratories to accept samples from and deliver test results directly to patients without authorization from a health care provider.⁴⁵⁹ These exceptions are usually extended to more familiar tests as those for cholesterol or pregnancy.⁴⁶⁰ As of 2007, at least twenty-five states limit or prohibit DTC testing.⁴⁶¹

Due to these limitations, some companies that advertise genetic tests directly to consumers require that a doctor actually order the test.⁴⁶² For some, this requirement may have been prompted by the FDA letters in the summer of 2010.⁴⁶³ Other companies seem to flout at least some state laws by sending the test packages directly to customers to collect and submit their own samples.⁴⁶⁴ For the companies that do require a health care provider to be involved in the process, customers have an opportunity to receive counseling and discuss what the results mean. Hopefully, those companies send information to the doctors about the tests—what the statistics are based on, and what the limitations of the results are. If not, the doctor may be in no better position to explain the test results to the patient than if the patient had received them directly from the company.

A. Single Case Study: Innovation and Information vs. Efficacy and Privacy

DTC companies seem to have skirted (intentionally and accidentally) most of the piecemeal regulation that “would have,

⁴⁵⁸ See *Survey of Direct-to-Consumer Testing Statutes and Regulations*, GENETICS AND PUB. POLY CTR. (June 2007), available at <http://www.dnapolicy.org/resources/DTCStateLawChart.pdf> (outlining testing regulations comprehensively by state).

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ See *id.*

⁴⁶² See, e.g., *How Our Services Work*, NAVIGENICS, http://www.navigenics.com/visitor/what_we_offer/how_it_works/ (last viewed Jan. 2, 2012) (“Sign up for Navigenics’ services through your physician or corporate wellness program.”).

⁴⁶³ Dan Vorhaus, *What Five FDA Letters Mean for the Future of DTC Genetic Testing*, GENOMICS L. REP. (June 11, 2010), <http://www.genomicslawreport.com/index.php/2010/06/11/what-five-fda-letters-mean-for-the-future-of-dtc-genetic-testing/> (explaining that the FDA sent letters to five major DTC genetic testing companies, advising them that they were operating without FDA approval).

⁴⁶⁴ See, e.g., 23ANDME, *supra* note 1.

should have, could have” covered genetic testing. Critics of DTC genetic tests argue that consumers are vulnerable to being misled by big promises and technical wizardry. In the fantasy world of fiction and special effects, genetic knowledge can be liberating, but in the real world, many consumers may be unable to make appropriate decisions about whether to get tested, where to find a test provider, or how to interpret the results. This is not to sell the consumer short. To the contrary, consumers today research their purchases more than ever.⁴⁶⁵ But as we have learned from the clash of print journalism and blogs, content matters less than the headlines. So when *Time Magazine* proclaims DTC genetic testing as the invention of the year, it seems legitimate. Of course, if editors announced that “Viagra Sheets”—yes, sheets treated with Viagra that then seeps through the skin and into the bloodstream—were the invention of the year, we might question their selection process.⁴⁶⁶

But I digress. Genetics is not the basic science course we took in the ninth grade. It is a complicated and complex field that involves many moving parts. A consumer considering genetic testing might find it difficult to understand those tests that are accepted by the medical community and those which are offered more for the sake of curiosity. DTC genetic tests results might give you advice on your athletic prowess, your tolerance for spicy food, or your sneeze reflex. They might also reveal that you are at a high risk for diabetes but that, genetically speaking, you might have a low response rate to the most common diabetes medications. What is the scientific validity of either set of data? While this Article speaks of these issues and concerns in the abstract, a case study can illustrate it better.

I, the author, wanted to see what would happen if I participated in genetic testing—twice. First, I used a DTC genetic testing company (DTC Test). Then, with the consult of my primary care physician, I had a clinical genetic test performed (Clinical

⁴⁶⁵ See Jack Loechner, *Online Research A Significant Part of Consumer Buying*, MEDIAPOST BLOGS (Feb. 22, 2011, 10:16 AM), http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=145226.

⁴⁶⁶ Actually, the London newspaper *The Sun* labeled Viagra Sheets as one of the upcoming year’s “amazing inventions.” Mark Hudson, *Viagra Sheets are Hard to Beat*, THE SUN (Jan. 2, 2010), <http://www.thesun.co.uk/sol/homepage/features/2790931/Viagra-sheets-are-hard-to-beat-Best-inventions-for-2010.html>.

Test). Both testing providers shall remain anonymous. Since I live in Georgia, a state that seems to prohibit DTC genetic testing,⁴⁶⁷ I was curious if the DTC Company would in fact perform the test. It happily accepted my money.

The DTC Test was perhaps most interesting because it tested for so many different diseases, traits, drug interactions, etc. Here is a highlight of the entertaining portions: I have a lower risk of developing near-sightedness among Asian populations (I am not Asian), I am a likely sprinter (not so much), I have more freckles than average (freckle free), and I effectively learn to avoid errors (based on my childhood capers, my parents might disagree). But since the Clinical Test did not examine those genetic traits, there is no basis for comparison.

The real opportunity for comparison comes at the disease prediction level. This is where the tests varied, and sometimes completely disagreed. For example, the DTC Test concluded that I have a 12% chance of developing Alzheimer's disease. According to the DTC Company, the average risk is about 7%. The Clinical Test marked my disease risk at 6%. The DTC Company also reported that I have a 21% chance of developing Atrial Fibrillation (irregular heart rhythm). The Clinical Test showed 14%. The average risk in the female population is 16%. While the discrepancies in the risk statistics for both Alzheimer's and Atrial Fibrillation are not huge spreads, the difference is having an "above average" or "below average" risk. For some of the other

⁴⁶⁷ See GA. CODE ANN. § 31-22-4(a) (2011) ("A clinical laboratory shall examine human specimens only at the request of a licensed physician, dentist, or other person authorized by law to use the findings of laboratory examinations."). The Georgia Code further defines a clinical laboratory as:

[A] facility for the biological, microbiological, serological, chemical, immunohematological, hematological, biophysical, cytological, pathological, or other examination of materials derived from the human body for the diagnosis of, recommendation of treatment of, or for the purposes of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of human beings; the term "clinical laboratory" shall include specimen collection stations and shall include blood banks which provide through their ownership or operation a system for the collection, processing, or storage of human blood and its component parts as well as tissue banks which procure, store, or process human or animal tissues designed to be used for medical purposes in human beings.

GA. CODE ANN. § 31-22-1(2) (2011).

predictive risks (diabetes, hypertension, migraines) the results were very similar. For others (various forms of cancer, autoimmune diseases, musculoskeletal disorders), the results were at odds with one another, showing either lower or higher than average risks.

The DTC Company also requested my participation in its larger research pool. My results would be used for future studies of that company's genetic "community." I declined that invitation. Apparently, however, this did not un-invite me from the company's genetic social network. My results were delivered through my online account. When I log into the account it tells me that I have new messages from my "genetic kin"—people with whom I share common DNA segments with. I have received what I call "Genetic Friend" requests from a "third-to-distant" cousin in Scotland and "third-to-fifth cousin" in Oregon. To my knowledge, I do not have extended family in either location, and their names do not register anywhere on my family tree. This type of information is not available with the Clinical Genetic Test.

While I was able to review my test results from both companies with my doctor, there are some people who will not or for some reason cannot. While some of the superficial information is entertaining, it should be cause for concern that genetic tests are not standardized, do not report results in the same manner, and do not use the same statistical research pools. If a company informs a customer that they are more resistant to some medications and allergic to others, is that accurate information that the consumer can then put down on his or medical history? One could envision a scenario in the not-too-distant future where a DTC genetic test informs a consumer that she has a reduced risk for breast cancer and she then foregoes a mammogram. Disclaimers and exclusions aside, a lawsuit would still probably be filed. Innovation and information are amazing tools when used correctly. They can also be incredibly destructive. Regulation can and should standardize the DTC genetic tests and filter out the flow of unsupported claims and promises.

B. What the Doctor Ordered: A Dose of Regulation

It would be a misstep, and ultimately a Sisyphean task, to regulate DTC genetic tests without considering the future of the

technology, the broad concerns, and the complete regulatory framework. Consequently, questions arise about how far we should regulate DTC genetic testing, who should be responsible for ordering the test and receiving the results, and how those tests should be marketed. The regulations set forth by the FDA, CMS/CLIA, and the FTC create a confused and jumbled set of impotent laws. Rather than working together, the triad seems to work against each other. And since DTC testing evades the reach of certain regulations, it seems to operate in a vacuum instead of a transparent scheme.

1. Current Events

For more than one year, the FDA has contended that the current crop of DTC genetic tests offered to consumers is subject to regulation under Section 201 of the federal Food, Drug and Cosmetic Act (FDCA).⁴⁶⁸ The FDA included that proviso in each of its “it has come to our attention” letters that were sent to DTC companies in June and July 2010. Although the agency made its point, it seems to be dragging its feet on revising how it would regulate these tests and whether it would sweep LDTs within the confines of medical device regulation. If that were in fact the FDA’s intent, it would remove LDTs from the loose grips of CMS, which only supervises a tiny fraction of the LDT market.⁴⁶⁹

In an effort to clarify its intentions, the FDA met with DTC industry players in March to discuss the DTC testing and LDT regulatory reform.⁴⁷⁰ The meeting also included conversations about how to best integrate the laboratories that lack CLIA certification.⁴⁷¹ The FDA is perhaps in the process of now drafting either new regulations or determining how to revise existing regulations to include LDTs and DTC genetic tests. From the meeting, it appears that the crux of the FDA’s regulatory shift is the adoption of a risk-based evaluation system that would develop a standardized regulatory environment for all DTC genetic testing

⁴⁶⁸ Dan Vorhaus, *The FDA and DTC: Setting the Record Straight*, GENOMICS L. REP. (March 11, 2011), <http://www.genomicslawreport.com/index.php/2011/03/11/the-fda-and-dtc-genetic-testing-setting-the-record-straight/>.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

companies and their products.⁴⁷² How the FDA plans to parse out risk and harm remains a mystery. But I propose some guiding principles below that might streamline the current regulatory mess and uncertainty.

2. The Mechanics

I submit that we are well past the point of the “will it or won’t it” regulate debate. The FDA has taken clear and affirmative steps in circling the wagons around DTC genetic testing, and it’s unlikely to just forget and move on to some other regulatory calamity. Any eventual regulation will be the answer to the (literally) million-dollar question: What are “the risks and benefits of making clinical genetic tests available for direct access by a consumer without the involvement of a clinician.”⁴⁷³

The FDA regulates medical devices by a class hierarchy. Class I devices are the least invasive and least regulated and Class III devices are highly invasive and strictly regulated. DTC genetic tests fall somewhere in between. One could make a strong argument that DTC genetic tests qualify as Class II devices, but a DTC genetic test might also be classified as a Class I Hematology and Pathology device.⁴⁷⁴ Strictly construed, 21 C.F.R. § 864.4020(b)(2), dictates that Class I is the correct class for hematology and pathology devices provided that the device is not used in blood banking tests. The FDA added to the confusion by sending letters to the owners of companies that sell DTC genetic tests that reference “section 201(h) of the Federal Food Drug and Cosmetic Act.”⁴⁷⁵ But the letters were ambiguous letters, and

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ 21 C.F.R. § 864.4010 (2011).

⁴⁷⁵ This reference should actually be 21 U.S.C. § 321(h) (2006), which defines a device as:

[A]n instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part or accessory, which is (1) recognized in the official National Formulary, or the United States Pharmacopeia, or any supplement to them, (2) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or (3) intended to affect the structure or any function of the body of man or other animals, and which does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and which is

provided little, if any, information to companies about how the FDA actually plans to regulate the DTC genetic tests.

As explained above, if DTC genetic tests are regulated as a “device” as provided by 21 U.S.C. § 321(h),⁴⁷⁶ they must fit within one of three classes. The baseline is provided by the general controls referenced in the definition of Class I devices in 21 C.F.R. § 860.3(c)(1). First, the device must conform to all performance standards of 21 U.S.C. § 360d, which are meant to provide “reasonable assurance of safe and effective performance.”⁴⁷⁷ Safety and effectiveness must be substantiated with evidence from scientific studies, including clinical tests and controlled experiments, pursuant to 21 C.F.R. § 806.7(c), (d) (2011).

Title 21 U.S.C. § 360c(a)(1)(A) discusses the general controls governing “a device for which the controls authorized by or under section 351, 352, 360, 360f, 360h, 360i, or 360j of this title.”⁴⁷⁸ Title 21 U.S.C. §§ 351(e)(1) and (2) govern the part of the general controls that requires the device to be in conformity with the performance standards of U.S.C. § 360d, or the device will be regarded as adulterated. Oddly, however, the opening words of 21 U.S.C. § 360d(a)(1) state that “the special controls required by section 360c(a)(a)(B) of this title shall include performance standards for a class II device.”⁴⁷⁹ Thus, it is not clear from the language if the performance standards are actually meant to apply to Class I devices. If, indeed, the performance standards do apply to Class I devices, the device would undergo a litany of pre-market activities. Otherwise, DTC genetic tests should be Class II devices so that performance standards can safeguard efficacy, accuracy, and reliability.

not dependent upon being metabolized for the achievement of its primary intended purposes.

⁴⁷⁶ *Id.*

⁴⁷⁷ “Safety and effectiveness,” according to 21 U.S.C. § 360c(2) (2006), “are to be determined (A) with respect to the persons for whose use the device is represented or intended, (B) with respect to the conditions of use prescribed, recommended, or suggested in the labeling of the device, and (C) weighing any probable benefit to health from the use of the device against any probable risk of injury or illness from such use.” Title 21, C.F.R. § 860.7(b)(4) (2011), adds that “the reliability of the device” must be considered.

⁴⁷⁸ 21 U.S.C. § 360c (a)(1)(A) (2006).

⁴⁷⁹ 21 U.S.C. § 360d (a)(1) (2006).

As it pertains to DTC genetic tests, the Secretary of Health and Human Services (Secretary) would publish in the Federal Register a notice of proposed rulemaking for the establishment of a performance standard, which includes justification for the performance standard, as well as proposed findings of the risk that the performance standard is meant to combat.⁴⁸⁰ Further, interested persons are invited to submit to the Secretary requests for changes in the classification of the device.⁴⁸¹ Presumably, the DTC companies would submit a request to have the least amount of regulation (Class I) and escape the mandated performance standards. The general controls also include provisions for the construction, testing, measurement of the performance, any necessary restrictions for the sale and distribution of the device, and labeling requirements, pursuant to 21 U.S.C. § 351. They also go on to require annual registration for “every person who owns or operates any establishment” that produces a device, with certain exceptions.⁴⁸²

Unfortunately, the regulations lack specific guidance regarding how the FDA measures a device’s performance. If a DTC is classified as Class I, 21 U.S.C. § 360i(a)(8) specifically states that the Secretary “may not require a manufacturer or importer of a class I device to maintain for such a device records respecting information not in the possession of the manufacturer of importer, or to submit for such a device to the Secretary any report or information not in the possession of the manufacturer or importer, or on a periodic basis”⁴⁸³ Thus, if a study on a specific Class I device is published, the manufacturer need not make the FDA aware of such a report. The FDA does, however, publish information on its website regarding what is required for safety and effectiveness data for Class III devices.⁴⁸⁴

⁴⁸⁰ See OFFICE OF DEVICE EVALUATION, FDA SUMMARY OF SAFETY AND EFFECTIVENESS DATA (SSED): CLINICAL SECTION CHECKLIST (June 10, 2010), available at <http://www.fda.gov/downloads/AboutFDA/CentersOffices/CDRH/CDRHTransparency/UCM220929.pdf>.

⁴⁸¹ *Id.*

⁴⁸² 21 U.S.C. § 360 (b) (2006).

⁴⁸³ 21 U.S.C. § 360i(a)(8) (2006).

⁴⁸⁴ See *Medical Devices*, U.S. DEPT OF HEALTH AND HUM. SERVS. (Feb. 19, 1998), <http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/ucm080195.htm>.

Labeling and branding requirements are governed by 21 U.S.C. § 352. The general controls require that a device's label contain, placed "prominently": (1) the name and place of business of the manufacturer, packer, or distributor; and, (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count. The label must also contain the established name of the device, adequate directions for use (including warnings for ways in which the device should not be used). This particular section also includes requirements for the contents of "advertisements and other descriptive printed matter."⁴⁸⁵

If the device violates the statutes, the Secretary is authorized to ban it.⁴⁸⁶ The Secretary may also require that the manufacturers provide notification of a risk posed by the device to those classes of people the Secretary identifies.⁴⁸⁷ Other remedies for statutory violations include repair, replacement, or refund.⁴⁸⁸ Placing a device in Class II means that either the general controls for Class I are not sufficient "to provide reasonable assurance of its safety and effectiveness," the device "is purported or represented to be for use in supporting or sustaining human life," or both.⁴⁸⁹

According to 21 U.S.C. § 360c(a)(1)(B), a device is classified as Class II "because the general controls by themselves are insufficient to provide reasonable assurance of the safety and effectiveness of the device."⁴⁹⁰ This seems to indicate that the special controls are those "appropriate actions as the Secretary deems necessary" in addition to the Class I general controls.⁴⁹¹ Class III indicates that the special controls provided for Class II devices are necessary in combination with pre-market approval, and that "the device is life-supporting or life-sustaining,"⁴⁹² or for a

⁴⁸⁵ 21 U.S.C. § 352 (2006).

⁴⁸⁶ 21 U.S.C. § 360f(a) (2006).

⁴⁸⁷ 21 U.S.C. § 360h(a) (2006).

⁴⁸⁸ 21 U.S.C. § 360h(b) (2006).

⁴⁸⁹ 21 C.F.R. § 860.3(c)(2) (2006).

⁴⁹⁰ 21 U.S.C. § 360c(a)(1)(B) (2006).

⁴⁹¹ *Id.*

⁴⁹² Title 21 C.F.R. § 860.3(e) (2011), defines "life supporting or life sustaining" as a "device that is essential to, or that yields information that is essential to, the restoration or continuation of a bodily function important to the continuation of human life."

use which is of substantial importance in preventing impairment of human health, or if the device presents a potential unreasonable risk of illness or injury. For this reason, it might be difficult to present the DTC genetic tests as devices requiring pre-market approval. One author's argument assumes that Class III is the correct classification, and further posits that the FDA could then deny PMA applications because of the great social harms posed by DTC genetic tests (such as selective abortion).⁴⁹³ Nonetheless, it is unlikely that the FDA would consider such a hypothetical and unquantified risk.

Premarket Approval (PMA) is often required for types of devices that "involve new concepts and many are not of a type marketed prior to the Medical Device Amendments."⁴⁹⁴ This is significant because marketers of DTC genetic tests attempt to frame their tests as more akin to pregnancy tests (or blood glucose level tests) than rapid HIV tests. PMA is governed by 21 U.S.C. § 360e. It requires submission of an application that includes detailed information about the device, some of the contents of which are outlined at 21 U.S.C. § 360e(c). The application should include: (1) All information about investigations that have been made to show whether the device is safe and effective; (2) Full disclosure of the methods for operating the device; (3) Description of the methods and facilities used for manufacture of the device, as well as packaging and installation; (4) Reference to any performance standards relevant to the device if it were a Class II device; (5) Any device samples required by the Secretary; (6) Specimens of the proposed labeling; (7) and, any additional information required by the Secretary.⁴⁹⁵

DTC genetic tests most closely resemble Class II devices because they are usually marketed to consumers as providing information that will allow the consumer to prolong a healthy life or plan for future illness, which fits into the idea of being

⁴⁹³ 21 U.S.C. § 860.3(c)(3) (2006); James D. Kerouac, *The Regulation of Home Diagnostic Tests for Genetic Disorders: Can the FDA Deny a Premarket Application on the Basis of the Device's Social Impacts?*, 5 J. BIOLAW BUS. 34 (2002).

⁴⁹⁴ *Medical Devices Premarket Approval (PMA)*, U.S. DEP'T OF HEALTH AND HUM. SERVS., <http://www.fda.gov/medicaldevices/deviceregulationandguidance/howtomarketyourdevice/premarket submissions/premarketapprovalpma/default.htm> (last visited Jan. 2, 2012).

⁴⁹⁵ 21 U.S.C. § 360e(c) (2006).

“represented to be for use in supporting or sustaining human life.”⁴⁹⁶ By placing DTC genetic tests into Class II, the Secretary must also consider what information about the device must be publicized.⁴⁹⁷ Furthermore, this would make the device subject to the general controls of Class I, which might be adequate if enforced systematically.

DTC genetic tests might fall short of meeting the general controls of Class I (therefore placing them into Class II) on assurances of effectiveness. Pursuant to 21 C.F.R. § 860.7(e)(1) (2006), effectiveness requires that the device, when used properly, will provide “clinically significant results.” For instance, in *F.T.C. v. Seville Mktg. Ltd.*,⁴⁹⁸ the FTC sought an injunction against the marketers of the “Discreet HIV/AIDS test” for deceptive acts in their claims that “the test results are 99.4% accurate. Over the past two years we’ve had three independent studies done on Discreet and our 99.4% accuracy rate is based upon these studies.”⁴⁹⁹ The fact that the FTC brought a claim against a company emphasizes that the FTC (which works closely with the FDA in such cases, in as much as the FTC looks at the trade practices of the companies that market devices) recognizes that the claims of marketers are unsubstantiated.

If DTC genetic tests were classified as Class II devices, the Secretary and Commissioner of Food and Drugs (Commissioner) would have the power to require additional studies to ensure the effectiveness of each home use test device. Moreover, classifying DTC genetic tests as Class II devices would ensure that the safety and effectiveness of data submitted to the Commissioner is made available immediately for public disclosure upon request, even if the data has never before been disclosed.⁵⁰⁰ In many ways, DTC genetic tests are similar to home use rapid HIV tests, which are Class III devices, only one of which has ever been approved for over-the-counter use.⁵⁰¹ These particular HIV tests require pre-

⁴⁹⁶ 21 C.F.R. § 860.3(c)(2) (2006).

⁴⁹⁷ 21 U.S.C. § 360c(b) (2006).

⁴⁹⁸ *F.T.C. v. Seville Mktg., Ltd.*, No. 04CV01181, 2004 WL 4003269 (W.D. Wash. May 14, 2004).

⁴⁹⁹ *Id.*

⁵⁰⁰ 21 C.F.R. § 860.5(b) (2011).

⁵⁰¹ *FDA Discusses Studies to Support OTC HIV Test Kits*, 21 AIDS ALERT 45 (2006).

market approval.⁵⁰² This classification is not only based on the fact that the general controls of Class I⁵⁰³ would be insufficient, but further due to the potential insufficiency of Class II controls, and the fact that the device “is purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, or presents a potential unreasonable risk of illness or injury.”⁵⁰⁴ The classification also considers the levels of complexity in using the device, as outlined by CLIA.

Regulation does not come without resistance nor does it come without stumbles. Historically, LDT manufacturers (and therefore DTC genetic tests) have existed outside the restrictions of medical device regulations. A new set of regulatory impediments that apply to either all or some of the LDT market (such as only to DTC genetic tests) could cripple clinical laboratories both financially and on the production and innovation line. If uniformity and standardization across LDTs is the goal, then the FDA would also add a tremendous amount of work to its plate. There will be budget issues on both sides of the fence, but while a transition from lax oversight to full-fledged regulation will not be seamless, it is not impossible. More importantly, if regulation is inevitable, it should happen sooner rather than later.

CONCLUSION

DTC companies post numerous disclaimers telling consumers that the tests do not diagnose disease and that the results are not medical advice. These caveats are crafted with purposeful detail by company lawyers who are trying to insulate the tests from regulatory scrutiny. The FDA has rightly noted that these tests fall within the scope of its regulation. How long it will take the FDA to act upon its intention is a separate matter. Although there are concerns about the repercussions from exposing the public

⁵⁰² Elliot Cowan, FDA Chief of Product Review Branch, Presentation at FDA Workshop on Study Methodology for Diagnostics in the Post-Market Setting: Point-of Care Diagnostics in Post-Approval Settings (May, 12, 2011), *available at* <http://www.fda.gov/downloads/MedicalDevices/NewsEvents/WorkshopsConferences/UCM256339.pdf>.

⁵⁰³ 21 U.S.C. § 360c(a)(1)(A) (2006).

⁵⁰⁴ 21 U.S.C. § 360c(a)(1)(C) (2006).

genetic information, this concern is abstract and ambiguous. I submit that the proper amount of regulation comes in the form of ensuring the accuracy and reliability of the information in addition to requiring context in reporting the results. The March 2011 meeting between the FDA and DTC companies batted around various suggestions such as requiring DTC company laboratories to have CLIA certification, in-house clinicians, or genetic counselors.⁵⁰⁵ Those suggestions are myopic and miss the point. Thrusting specific employees or lab standards on these companies will not necessarily safeguard the validity of the data and manage consumer expectations.

How best to regulate these tests? The CMS/CLIA system is antiquated and limited. DTC genetic tests qualify as medical devices and the FDA should ensure the validity, accuracy, and reliability of these tests and their progeny. That includes applying common scientific standards and principles used for other genetic and DNA-based tests. It also embraces the requirement of analytic and clinical validity and clinical utility. Regulation must, at the very least, include pre-market approval and, hopefully, encompass post-market approval as well. Although the FTC would retain its advertising kingdom, it would actually have to do something affirmative by regulating the accuracy and content of DTC genetic testing advertisements, promotional activities, and online transactions.

The development of DTC genetic tests that purport to provide diagnostic and medically significant information is moving at a pace that has left the law in the dust. With more consumers providing biological samples, reporting health histories, and participating in genetic social networking, the need to regulate the industry is great. As the law struggles to catch up with these technological developments, it must remember to temper its regulatory force in a manner that fosters innovation, protects privacy, and reinforces accuracy and reliability. While it is true that these genetic tests involve a minimally invasive method that simply collects spit, at a minimum, the end result presents real possibilities for intrusion, confusion, and disillusion. Consequently, the most direct approach is to regulate the tests

⁵⁰⁵ See Vorhaus, *supra* note 468.

from the bottom-up as opposed to relying on a patchwork of regulations, which only cover their fragmented components. Anything less relegates these tests to the whimsy level of a genetic horoscope—and perhaps that is where they should remain if regulation remains elusive.

As the lines between proactive and reactive medicine begin to blur and converge, direct-to-consumer genetic testing could prove to be a valuable tool in the ongoing health care debate. But in order to attain that status, it must meet set standards. Talk about personalized medicine: “Science itself is incremental, and what we’ve learned through example after example over decades is that when dealing directly with human health, the integration of science with medicine and other consumer applications must be careful and methodical.”⁵⁰⁶

⁵⁰⁶ See Gruber, *supra* note 386, at 2.

GIDEON'S VUVUZELA¹: RECONCILING THE SIXTH AMENDMENT'S PROMISES WITH THE DOCTRINES OF FORFEITURE AND IMPLICIT WAIVER OF COUNSEL

*Sarah Gerwig-Moore**

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¹ As those of us watching the 2010 FIFA World Cup came to learn, a vuvuzela (also known by its Tswana name, *lepatata Mambu*) is a plastic horn emitting a tone somewhat more diffuse and whiny than that of a trumpet.

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INTRODUCTION

Dating back to the early decades of the twentieth century, the United States Supreme Court has articulated clear, venerable standards for the waiver of constitutional rights²—and in particular the right to counsel. This is a rich area for both litigation and teaching, if only to be able to repeat phrases such as "courts indulge every reasonable presumption against waiver" and "we do not presume acquiescence in the loss of fundamental

² See, e.g., *Swenson v. Bosler*, 386 U.S. 258 (1967); *Carnley v. Cochran*, 369 U.S. 506 (1962); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

rights.”³ A defendant must proceed with “eyes open,”⁴ and a waiver will not be presumed from a “silent record.”⁵ Consistently affirmed and reaffirmed by the United States Supreme Court and lower state and federal courts, these are cornerstones of our system of criminal justice.

However, a significant corpus of cases has developed that allows, under certain circumstances, a “forfeiture,” an “implicit waiver,” or a “waiver by conduct” of the right to counsel.⁶ Given the scrutiny courts have extended to “knowing and intelligent” waivers of the right to counsel,⁷ this is contradictory, if not troubling. These cases—from both federal and state appellate courts and the lower courts generating the litigation—seem to be in direct contravention of United States Supreme Court precedent on this matter. Under that jurisprudence, a defendant has an unequivocal right to certain information before a waiver is found, and a demand (contemporaneously and on later inquiry) for an unequivocal and intelligent relinquishment of those rights.⁸ This newer “implicit waiver” bypasses that inquiry for a defendant who later finds himself without protection—or an attorney, for example—without having expressly decided to forego counsel’s representation.⁹

A particular line of cases addressing circumstances unique to the stress of a trial has created the doctrines of forfeiture and implicit waiver of trial counsel.¹⁰ A defendant, for example, may

³ *Johnson*, 304 U.S. at 464 (internal quotation marks omitted).

⁴ *Faretta v. California*, 422 U.S. 806, 835 (1975) (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279 (1943)).

⁵ *Miranda v. Arizona*, 384 U.S. 436, 498 (1966) (knowing and voluntary waiver of Fifth Amendment right not to be compelled to incriminate himself); *see, e.g., Faretta*, 422 U.S. 806 (knowing and voluntary waiver of Sixth Amendment right to counsel); *Johnson*, 304 U.S. 458 (knowing and voluntary waiver of Sixth Amendment right to counsel).

⁶ *Carnley*, 369 U.S. at 516 (“The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer.”).

⁷ *Gilchrist v. O’Keefe*, 260 F.3d 87, 95 (2d Cir. 2001); *see also Johnson*, 304 U.S. at 464.

⁸ *Adams*, 317 U.S. at 279.

⁹ *See, e.g., Brewer v. Williams*, 430 U.S. 387 (1977).

¹⁰ *Commonwealth v. Means*, 907 N.E.2d 646, 658 (Mass. 2009) (“Forfeiture is an extreme sanction in response to extreme conduct that imperils the integrity or safety of court proceedings.”).

constructively waive the right to trial representation by agitating his lawyer, court personnel, or others in such a way as to deliberately delay or derail the trial.¹¹

There is very little formal literature on this topic, although a very recent online ABA Journal has drawn attention to it in a fairly sensational way.¹² Otherwise, a survey of law reviews and other secondary literature reveals little explanation or insight.¹³ The United States Supreme Court has never explicitly addressed the constitutionality of the waiver by conduct, constructive waiver, or forfeiture doctrines or the processes by which courts apply them.¹⁴

This project began with an attempt to define, describe, and disambiguate forfeiture from implicit waiver/waiver by conduct, and to discuss the rationales and policies behind why these doctrines have emerged (yet highlighting the reasons why criminal defendants might reasonably attempt to disrupt the process). Many of these court opinions explore puzzling, contradictory definitions of both the terms and application of the doctrines. But as the survey produced more and more shades of gray, sifting the doctrines and approaches became less interesting than looking beneath them for the analytical assumptions and legal underpinnings of these doctrines.

Ultimately, however, what may be most useful to courts and practitioners, as well as students of this area of the law, are ideas for avoiding the circumstances that bring such cases to the state

¹¹ *United States v. Green*, 388 F.3d 918, 921 (6th Cir. 2004); *United States v. Goldberg*, 67 F.3d 1092, 1098 (3d Cir. 1995); *Maynard v. Meachum*, 545 F.2d 273, 278 (1st Cir. 1976).

¹² Martha Neil, *Reportedly Stabbed in Neck by Client With Pencil During Court Hearing, Lawyer Stays on Case*, A.B.A. J. (May 10, 2011, 11:26 AM), http://www.abajournal.com/news/article/stabbed_in_neck_by_client_with_pencil_during_court_hearing_lawyer_stays_on/.

¹³ After an exhaustive search of scholarly essays, journals, and notes on the topic, only three appear to be relevant to the idea of implicit waiver or a forfeiture of counsel through conduct. See Jodie L. Carlson, *State v. Jones and Forfeiture by Wrongdoing: When is a Defendant's Behavior Bad Enough to Result in Forfeiture of the Right to Counsel?*, 37 WM. MITCHELL L. REV. 819, 823-25 (2011); Scott M. McLeod, *Constitutional Law—Sixth Amendment Right to Counsel—Forfeiture of the Right to Counsel in Tennessee*, 78 TENN. L. REV. 589 (2011); Jeffrey P. Willhite, *Rethinking the Standards for Waiver of Counsel and Proceeding Pro Se in Iowa*, 78 IOWA L. REV. 205 (1992).

¹⁴ See *infra* Section III.

and federal appellate courts. Take, for example, *Davis v. Frazier*,¹⁵ which illustrates the stakes for the defendant, the possibility of a full meltdown of the judicial process, and the vast expense (dare I say waste) of resources as it has wound its way through habeas and appellate courts for more than ten years.

Following his conviction for rape, child molestation, and kidnapping in 2000, Mr. Davis was appointed counsel to assist him in prosecuting an appeal, which included an allegation of ineffective assistance of trial counsel.¹⁶ He proceeded to compile a lengthy list of appellate attorneys who endured a somewhat contentious relationship with Mr. Davis, who frequently demanded communication and visits from his attorneys. All six of these attorneys eventually withdrew or were dismissed—some because of Mr. Davis's complaints or behavior and others for reasons completely unrelated to Mr. Davis.¹⁷ After his seventh appointed attorney withdrew (listing receipt of an angry letter from his client as his reason for doing so), the court informed Davis that he would have to retain counsel privately or represent himself.¹⁸ No hearing was ever held warning Mr. Davis that complaints about or discord with his counsel might cause him to lose his right to counsel.

Over strenuous objections, Mr. Davis finally conducted his own Motion for New Trial hearing, which was subsequently denied.¹⁹ He appealed pro se, lost, and then petitioned pro se for certiorari (which was dismissed as untimely). Still pro se, he filed a habeas petition in 2006 and appealed from that denial to the Supreme Court of Georgia. That court, perceiving a cognizable legal issue, remanded his case to the habeas court for the purpose

¹⁵ 673 S.E.2d 215 (Ga. 2009); *Davis v. State*, 628 S.E.2d 374 (Ga. 2006); *Davis v. State*, 615 S.E.2d 203 (Ga. Ct. App. 2005). This case is more than a mere illustration. I served as pro bono counsel in Mr. Davis's first case in the Georgia Supreme Court (after his pro se petition for certiorari was granted) and filed an amicus curiae brief on his behalf when he faced the supreme court again on a discretionary review from the denial of his habeas corpus petition. It is through my involvement in Mr. Davis's case that I became aware of and interested in this issue. The circumstances relayed here are, of course, limited to text from reported opinions and not to any privileged or confidential information.

¹⁶ *Davis*, 673 S.E.2d at 216.

¹⁷ *Davis*, 615 S.E.2d at 206-07.

¹⁸ *Davis*, 673 S.E.2d at 216.

¹⁹ *Id.*

of Mr. Davis being allowed to continue in his appeal—this time with counsel.²⁰

Mr. Davis was convicted in 2000 and is only just now—in 2010—facing a motion for new trial with the assistance of counsel. Since his trial, his case has journeyed through a pro se motion for new trial, a pro se appeal, consideration on certiorari in the Georgia Supreme Court, a state habeas petition, and a state habeas appeal.²¹ Would not a five-minute colloquy on the record, warning Mr. Davis of the dangers both of continuing his disruptive conduct and proceeding pro se, have been more judicially efficient than nearly ten years of appellate and post-conviction litigation?

It clearly would have been more efficient, and some jurisdictions require these sorts of warnings before counsel can be waived or forfeited by conduct. Other states and federal circuits, however, do not require special warnings, hearings, or other process before criminal defendants are forced to proceed without counsel. This Article attempts to not only catalogue jurisdictional approaches to this problem but to consider the values and principles underlying the variety of approaches on the subject. And while no one-size-fits-all answers will magically clarify puzzles that have perplexed a number of state and federal appellate judges, there is enough of a problem here to warrant some study, organized thinking, and perhaps even modification of existing approaches.

I. WAIVERS AND CONSTITUTIONAL RIGHTS, GENERALLY

A. *The Right to Counsel and Waivers Thereof*

Though it has not always been so, the right to appointed counsel for indigent defendants is now a bedrock of the U.S. judicial system.²² The assistance of counsel has always been understood to be “of fundamental character” and after *Gideon v.*

²⁰ *Id.* at 217-18.

²¹ *Id.* at 216.

²² U.S. CONST. amend. VI. The Sixth Amendment of the Constitution provides that: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” *Id.*

*Wainwright*²³ and *Alabama v. Shelton*,²⁴ states are required to provide competent counsel to defendants facing even the possibility of a prison or jail sentence.

Because counsel's assistance is so elementary—from meeting the state's evidence to navigating important choices through the process of a criminal case—there is a “[presumption] that the defendant requests the lawyer's services at every critical stage of the prosecution.”²⁵ And, consistently, the law is clear that in order to sustain a waiver of a constitutional right—including the right to counsel—the “record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.”²⁶

Put a little differently, “The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty *unless* he has or waives the assistance of counsel.”²⁷

The inquiry, by now is universal and standard: Was the defendant informed that the right to counsel existed?²⁸ Did he waive that right understanding what he was losing?²⁹ Do court records reflect both the information and the intelligent, voluntary waiver?³⁰ If the answers to these questions are “no,” then most United States Supreme Court precedent—at least as related to the

²³ 372 U.S. 335 (1963).

²⁴ 535 U.S. 654 (2002).

²⁵ *Michigan v. Jackson*, 475 U.S. 625, 633 (1986), *overruled by* *Montejo v. Louisiana*, 556 U.S. 778 (2009).

²⁶ *Carnley v. Cochran*, 369 U.S. 504, 516 (1962).

²⁷ *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (emphasis added).

²⁸ *Shafer v. Bowersox*, 329 F.3d 637, 648 (8th Cir. 2003) (“[A] trial court cannot accept a defendant's mere assurance that he has been informed of his right to counsel and desires to waive it.”).

²⁹ *United States v. Woodard*, 291 F.3d 95, 109 (1st Cir. 2002) (“A defendant who seeks to relinquish her right to counsel must so state in unequivocal language. . . . The waiver must be knowing, intelligent and voluntary. . . . The trial judge must explicitly make the defendant ‘aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.’”).

³⁰ *Johnson*, 304 U.S. at 465 (“The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.”).

waiver of the right to counsel—prohibits a later finding of the loss of that right.³¹

There are few exceptions to this, and those are at least practical under the circumstances. For example, although criminal defendants have the right to effective court-appointed counsel, it is also within their rights to waive this right or to choose to represent themselves.³² *Faretta* explained the right, co-existent with the right to representation, to dispense with counsel and navigate the process pro se.³³ However, courts are not required to inform every defendant of his right to self-representation, and before it is permitted, the court must confirm that he “knowingly and intelligently” gives up “the traditional benefits associated with the right to counsel.”³⁴ As with a general waiver of the right to counsel, before a defendant is permitted to proceed pro se,³⁵ the law requires that the defendant is “made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made

³¹ Beyond the right to counsel or to self-representation, waivers of other constitutional rights must also be made knowingly and voluntarily. For example, jurisprudence on the waiver of the right to trial is similarly clear and iron-clad. See *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969) (“Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.”). In order for a guilty plea to be found valid on later inquiry, a criminal defendant must fully understand both the meaning and consequences of that plea. *Id.* at 242. To ensure that a criminal defendant waives his constitutional rights with “eyes wide open,” before accepting a guilty plea, a trial court must apprise a criminal defendant of the constitutional rights that are being waived: (1) the right against self-incrimination, (2) the right to a jury trial, and (3) the right of confrontation. *Id.* at 243.

³² *Faretta v. California*, 422 U.S. 806, 819-20 (1975).

³³ *Id.*

³⁴ *Id.* at 835 (internal quotation marks omitted); see also *United States v. Frechette*, 456 F.3d 1, 12 (1st Cir. 2006); *United States v. Schmidt*, 105 F.3d 82, 88 (2d Cir. 1997); *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065 (11th Cir. 1986); *United States v. Welty*, 674 F.2d 185, 191 (3d Cir. 1982).

³⁵ See Frederic Paul Gallun, *The Sixth Amendment Paradox: Recent Developments on the Right to Waive Counsel Under Faretta*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 559 (1997) (“Almost sixty years ago, the Supreme Court recognized the risks of pro se representation and stated that the Framers based the Sixth Amendment on ‘a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take away his life or liberty.’”).

with eyes open.”³⁶ Some jurisdictions have added further factors to the general *Faretta* test, such as warning a defendant about the technical problems a defendant may face or the risks of unsuccessful pro se litigation.³⁷ This must all take place in open court and on the record, as “[t]he right to assistance of counsel and the correlative right to dispense with a lawyer’s help are not legal formalisms” but are protected by the Sixth Amendment.³⁸

“Shadow” or “standby counsel” is frequently afforded after counsel is waived in a *Faretta* hearing. The beginnings of the use of shadow counsel—more usual in federal court than in state courts—may reach back to dicta in the *Faretta* decision itself.³⁹ Although the appointment of “standby” or “shadow” counsel is a topic for an entire article—indeed, it has been—it merits a discussion here. Many jurisdictions—seeming uncertain of how to approach a difficult or delaying defendant—will take this middle path.

In its discretion, a court may appoint standby or shadow counsel to a defendant—even over his objection.⁴⁰ “Standby counsel acts as a safety net to insure the defendant receives a fair trial and to allow the trial to proceed without the undue delays likely to arise when a defendant represents him- or herself.”⁴¹

³⁶ *Faretta*, 422 U.S. at 835 (internal citations omitted). *But see Trials: Right to Counsel*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 507, 519 (2010) (“However, the right to proceed pro se is not absolute. A judge may reject a defendant’s request to proceed pro se if the request is untimely and may terminate self-representation if the defendant lacks sufficient mental capacity to conduct his defense without representation, or is unable to abide by the rules of procedure or courtroom protocol.”).

³⁷ *Welty*, 674 F.2d 185.

³⁸ *Faretta*, 422 U.S. at 815-16 (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942)).

³⁹ *Id.* at 806 (explaining that a court may, in its discretion, terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct and appoint “standby counsel” to aid the accused).

⁴⁰ Michael J. Kelly, *Making Faretta v. California Work Properly: Observations and Proposals for the Administration of Waiver of Counsel Inquiries*, 20 ST. JOHN’S J. LEGAL COMMENT. 245, 262 (2005) (“Most of the problems with standby counsel relate to the decision of the trial court to appoint counsel. Finally, the right to waive counsel can be ‘effectively denied’ if appointed standby counsel interfere in the pro se defendant’s case in any way. Thus, while standby counsel can benefit the defendant, problems may cause ‘animosity between standby counsel and the defendant.’”).

⁴¹ 21A AM. JUR. 2D *Criminal Law* § 1160 (2011).

B. The Foundations of Constructive Waivers, Implicit Waivers, and "Forfeiture" of the Right to Counsel

Courts' treatment of non-explicit waivers of counsel (whether styled as constructive waiver, waiver by conduct, implicit waiver, or forfeiture) is the main focus of this Article. We know a defendant can waive counsel knowingly and voluntarily after having received a *Faretta* warning. But—although various jurisdictions define the circumstances differently—nearly every state and circuit has a mechanism by which a defendant may be forced to proceed pro se without having elected to represent himself (or at least not in the same way anticipated in *Faretta*).

As background, however, it is useful to discuss the first-known cases in this area and historical treatments of these circumstances. The forfeiture/implicit waiver cases seem to stem from a few related but distinct roots of cases: cases relating to a delaying defendant; cases relating to a disruptive or potentially violent defendant;⁴² and cases in which a defendant at some point expresses a wish to defend himself (but who later changes his mind about self-representation).

Cases as early as the 1940s reflected courts' frustrations with clients perceived to be derailing the process by delaying hiring counsel.⁴³ Courts have long held that a defendant does not have an unrestricted right to counsel of his own choosing. But what is the appropriate remedy if a defendant does not secure an attorney's representation in advance of a trial?

The foundation for the current body of case law related to forfeiture or waiver by conduct may also have been laid in cases related to a client's disruptive presence in the courtroom. A series of United States Supreme Court decisions addressed this problem

⁴² See, e.g., *United States v. Travers*, 996 F. Supp. 6, 17 (S.D. Fla. 1998) (finding forfeiture as a result of the defendant's "persistently abusive, threatening and coercive" dealings with his attorney and noting that the defendant had been repeatedly warned that his failure to cooperate could result in a finding of forfeiture).

⁴³ See, e.g., *Spevak v. United States*, 158 F.2d 594, 596 (4th Cir. 1947) ("It seems clear that an accused who is able to employ counsel and fails to do so after being afforded opportunity, thereby waives the right and may not urge lack of counsel as excuse for delay.").

in the early 1970s and concluded that a defendant could lose his constitutional right to presence through his conduct.⁴⁴

So while it is difficult to fully trace the origins of the doctrines of implied/constructive waiver or forfeiture of counsel, it appears that they emerged at the intersection of cases allowing the loss of a constitutional right to presence during a trial (for disruptive conduct) and the potential loss of counsel after a refusal to hire an attorney. Only a handful of appellate opinions on the subject pre-date the early 1970s, but beginning in the 1980s, perhaps as courts began to smooth out any procedural wrinkles after *Gideon*, litigation and opinions on these subjects expanded remarkably. What we have now is a jumble of cases from nearly every state supreme court and federal circuit court of appeals that cover a broad range of defendants' behavior and various responses.

The *McLeod*⁴⁵ and *Goldberg*⁴⁶ opinions are the earliest ones that offer more than a passing discussion of the underlying problems. But even in those cases (and those citing them), it is difficult not to become mired in the terminology.⁴⁷

Forfeiture, according to *Goldberg*, can result in the complete deprivation of counsel (though often limited to proceedings other than a criminal trial) and is permitted in circumstances of extreme disruption of the criminal trial process⁴⁸—usually if a

⁴⁴ See *Taylor v. United States*, 414 U.S. 17, 20 (1973); *Illinois v. Allen*, 397 U.S. 337, 345-46 (1970).

⁴⁵ *United States v. McLeod*, 53 F.3d 322 (11th Cir. 1995).

⁴⁶ *United States v. Goldberg*, 67 F.3d 1092 (3d Cir. 1995).

⁴⁷ See *infra* Section II.

⁴⁸ These circuits and states recognize the doctrine of forfeiture: Second Circuit (*Gilchrist v. O'Keefe*, 260 F.3d 87 (2d Cir. 2001)); Third Circuit (*United States v. Leggett*, 162 F.3d 237 (3d Cir. 1998)); Sixth Circuit (*Gray v. Moore*, 520 F.3d 616 (6th Cir. 2008)); Eighth Circuit (*United States v. Thompson*, 335 F.3d 782 (8th Cir. 2003)); Eleventh Circuit (*United States v. McLeod*, 53 F.3d 322 (11th Cir. 1995)); Alaska (*Gladden v. Alaska*, 110 P.3d 1006 (Alaska Ct. App. 2005)); Arizona (*State v. Rasul*, 167 P.3d 1286 (Ariz. Ct. App. 2007)); Arkansas (*Beyer v. State*, 962 S.W.2d 751 (Ark. 1998)); California (*King v. People*, 132 Cal. Rptr. 2d 585 (Cal. Ct. App. 2003)); Colorado (*People v. Alengi*, 148 P.3d 154 (Colo. 2006)); Delaware (*Bultron v. State*, 897 A.2d 758 (Del. 2006)); Idaho (*State v. Lindsay*, 864 P.2d 663 (Idaho Ct. App. 1993)); Illinois (*People v. Tucker*, 889 N.E.2d 733 (Ill. App. Ct. 2008)); Indiana (*Jackson v. State*, 868 N.E.2d 494 (Ind. 2007)); Maryland (*Felder v. State*, 666 A.2d 872 (Md. Ct. Spec. App. 1995)); Massachusetts (*Commonwealth v. Means*, 907 N.E.2d 646 (Mass. 2009)); New York (*People v. Smith*, 705 N.E.2d 1205 (N.Y. 1998)); North Dakota (*City of Grand Forks v. Corman*, 767 N.W.2d 847 (N.D. 2009)); South Carolina (*State v. Roberson*, 675

defendant threatens his attorney with violence. In some jurisdictions, forfeiture is a potential consequence when a defendant engages in dilatory or other tactics to stall the legal process.⁴⁹

*Commonwealth v. Means*⁵⁰ also explains that the federal courts, and several state courts, recognize the doctrine of “forfeiture.”⁵¹ From a review of a number of forfeiture cases, the Massachusetts court concluded that there are four considerations that relate to whether forfeiture is appropriate: (1) forfeiture is typically applied in cases where a defendant had more than one appointed counsel; (2) forfeiture is rarely applied to deny a defendant representation *during a trial* but rather at other stages of a criminal matter; (3) forfeiture may be an appropriate response to a defendant’s threats or acts of violence against defense counsel and others; and (4) forfeiture should be a last resort response to only the gravest and most deliberate misconduct.⁵²

Means further distinguished between forfeiture, waiver by conduct (abandonment), and waiver (voluntary waiver).⁵³ *Goldberg* also differentiates: while forfeiture involves extreme behavior—with violence or threats of violence being the *baseline* of the inquiry—waiver by conduct, implicit waiver, and constructive waiver (used interchangeably in this Article and in most authority) involve a lesser form of disruption.⁵⁴

In circumstances less egregious than threatened or actual violence, but which are still disruptive to the criminal process, a number of states and circuits recognize or allow an “implicit waiver” of counsel.⁵⁵ This waiver by conduct more usually requires

S.E.2d 732 (S.C. 2009)); Tennessee (*State v. Holmes*, 302 S.W.3d 831 (Tenn. 2010)); Utah (*State v. Pedockie*, 137 P.3d 716 (Utah 2006)); Washington (*City of Tacoma v. Bishop*, 920 P.2d 214 (Wash. Ct. App. 1996)); Wisconsin (*State v. Cummings*, 546 N.W.2d 406 (Wis. 1996)).

⁴⁹ *Goldberg*, 67 F.3d at 1094 (“[T]here are circumstances in which the dilatory tactics of a defendant can amount to a forfeiture of his right to counsel.”).

⁵⁰ 907 N.E.2d 646 (Mass. 2009).

⁵¹ *Id.* at 659.

⁵² *Id.* at 659-60.

⁵³ *Id.* at 656-59.

⁵⁴ *Goldberg*, 67 F.3d at 1101.

⁵⁵ These circuits and states recognize the doctrine of implicit waiver: Fifth Circuit (*United States v. Davis*, 269 F.3d 514 (5th Cir. 2001)); Sixth Circuit (*King v. Bobby*, 433 F.3d 483 (6th Cir. 2006)); Seventh Circuit (*United States v. Bauer*, 956 F.2d 693

a warning—though not necessarily in a hearing or colloquy—and continued behavior may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel.⁵⁶

It is these two methods of conduct amounting to waiver that is the focus of this Article—whether it is consistent with constitutional principles, what “warnings” are sufficient, and what behavior may be deemed sufficiently egregious. Before a defendant can be deemed to have “waived” his right to counsel—either through constructive waiver or forfeiture—many jurisdictions require that he had been given at least some warning about the consequences of his actions. More specifically, in some jurisdictions,

before a judge finds that a defendant has forfeited his right to counsel and imposes the extreme sanction of denying an indigent defendant the assistance of counsel at trial or otherwise, she must first conduct a hearing at which the defendant has a full and fair opportunity to offer evidence as to the totality of the circumstances that may bear on the question whether the sanction of forfeiture is both warranted and appropriate.⁵⁷

For the purposes of this Article, however, it is the jurisdictions that do not require a hearing or colloquy before

(7th Cir. 1992)); Eighth Circuit (*United States v. Crawford*, 487 F.3d 1101 (8th Cir. 2007)); Ninth Circuit (*United States v. Sutcliffe*, 505 F.3d 944 (9th Cir. 2007)); Eleventh Circuit (*United States v. Garey*, 540 F.3d 1253 (11th Cir. 2008)); Alabama (*Harris v. State*, 27 So. 3d 582 (Ala. 2008)); Arizona (*State v. Hampton*, 92 P.3d 871 (Ariz. 2004)); Colorado (*People v. Alengi*, 148 P.3d 154 (Colo. 2006)); Florida (*Waterhouse v. State*, 596 So. 2d 1008 (Fla. 1992)); Georgia (*Jones v. State*, 536 S.E.2d 511 (Ga. 2000)); Hawaii (*State v. Maelega*, 88 P.3d 1208 (Haw. 2004)); Idaho (*State v. Lindsay*, 864 P.2d 663 (Idaho Ct. App. 1993)); Kentucky (*Depp v. Commonwealth*, 278 S.W.3d 615 (Ky. 2009)); Maine (*State v. Watson*, 900 A.2d 702 (Me. 2006)); Maryland (*Felder v. State*, 666 A.2d 872 (Md. Ct. Spec. App. 1995)); Rhode Island (*State v. Snell*, 892 A.2d 108 (R.I. 2006)); Tennessee (*State v. Carruthers*, 35 S.W.3d 516 (Tenn. 2000)); Utah (*State v. Pedockie*, 137 P.3d 716 (Utah 2006)); Washington (*City of Tacoma v. Bishop*, 920 P.2d 214 (Wash. Ct. App. 1996)); Wisconsin (*State v. Cummings*, 546 N.W.2d 406 (Wis. 1996)); Wyoming (*Trujillo v. State*, 2 P.3d 567 (Wyo. 2000)).

⁵⁶ See, e.g., *United States v. Bauer*, 956 F.2d 693, 695 (7th Cir. 1992) (finding that failure to hire counsel where defendant has financial ability to do so constitutes a waiver by conduct), *cert. denied*, 506 U.S. 882 (1992); *United States v. Allen*, 895 F.2d 1577, 1579 (10th Cir. 1990) (finding that the district court properly treated defendant's dilatory conduct as request to proceed *pro se*).

⁵⁷ *Commonwealth v. Means*, 907 N.E.2d 646, 652 (Mass. 2009).

denying a defendant his right to counsel that may be most interesting—because of a potential conflict with *Faretta* and jurisprudence protecting the right to counsel.

II. SURVEYING THE LANDSCAPE OF WAIVER AND FORFEITURE BY CONDUCT

Because of the lack of broad or comparative information on the doctrines of forfeiture and constructive waiver of counsel, this Article will lay out the variety of practices and conditions the circuit courts and state courts have addressed. Most jurisdictions have confronted the scenario described in the Introduction in one way or another, but as described previously, the terminology describing forfeiture, implicit waiver, and waiver by conduct is intertwined and ambiguous.

Some courts use different terminology to describe the same conduct (or court response), other courts appear to use the terms synonymously, and still others attempt to make distinctions among definitions. From the Third Circuit's *United States v. Goldberg* case, a fundamental opinion on the subject, readers gain no more insight to the doctrine despite lengthy discussion and attempted differentiation between forfeiture and traditional or implicit waiver.⁵⁸ Forfeiture is used when a court is not referring to an intentional waiver of rights, and *Goldberg* explains the importance of defining both "waiver by conduct" and "forfeiture," since appellate review of alleged Sixth Amendment violations may depend a good deal on the applicable doctrine and procedure.⁵⁹ There, forfeiture is defined in the lack of intentionality of a waiver (triggered by extreme conduct); however, other jurisdictions require a hearing or warning before finding "forfeiture," just as many do not require a hearing before finding implicit waiver or waiver by conduct. On the other side of this problem are cases such as *State v. Lindsay*,⁶⁰ an Idaho case from the mid-1990s,

⁵⁸ *Goldberg*, 67 F.3d 1092. "Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *Id.* at 1100.

⁵⁹ *Id.* at 1101.

⁶⁰ 864 P.2d 663 (Idaho Ct. App. 1993). The court ostensibly discusses waiver by conduct, not forfeiture as established in *Goldberg*, which was decided and became so

which uses the terms synonymously.⁶¹ The problem with using the terms interchangeably, however, is that each has become a term of art in other jurisdictions, though even the terminology varies in definition across jurisdictional lines.⁶²

It is useful, however, to become aware of the range of approaches and court reasoning, even if analytically there is little to gain from naming approaches differently or organizing a survey according to terminology. The language, in the end, does not matter. The result (and legal analysis leading to that result) means a great deal. Because, in these circumstances, courts have gone to great lengths to discuss a defendant's offending behavior (ranging from complaints to threats to physical violence) to match the required procedural approaches, this survey tracks a defendant's behavior rather than the court terminology for that behavior. Comparing apples to apples (or dilatory tactics to dilatory tactics), the conversation then becomes more useful and reveals sharp divisions among judicial responses, state supreme court opinions, and a federal circuit split on the issue.

A. Delay and "Dilatory Tactics": Approaches and Procedures

State and federal courts have developed a variety of approaches to defendants who attempt to delay, or otherwise derail, the process toward a trial, including postponing the retention of counsel or failing to cooperate with appointed counsel. While some courts require that trial courts thoroughly warn defendants of the possible repercussions (which may include being forced against their will to proceed pro se), others ensure that defendants receive and assent to this warning (in the form of a

influential after the opinion in this case. This conflicting terminology, however, occasionally persists in jurisdictions that have not explicitly adopted the forfeiture doctrine of the Third and other federal circuits.

⁶¹ *Id.* at 667 (stating that the defendant "impliedly waived or 'forfeited' that right [to counsel] by appearing at the . . . hearing without an attorney after having been given the opportunity to retain one").

⁶² See, e.g., *Harris v. State*, 27 So. 3d 564, 573 (Ala. Crim. App. 2007) (conflating implied waiver with forfeiture of the right to counsel); *Beyer v. State*, 962 S.W.2d 751, 755 (Ark. 1998) (finding that a defendant "forfeits" his right to counsel by delaying trial); *People v. Alengi*, 148 P.3d 154 (Colo. 2006); *People v. Tucker*, 889 N.E.2d 733, 736-37 (Ill. App. Ct. 2008) ("[D]efendant . . . in an attempt to delay trial and thwart the effective administration of justice may forfeit his right to counsel of choice.").

colloquy or dialogue with the court), and still others require no warning at all. A number of jurisdictions have not encountered this problem at the appellate level and are therefore not included in this discussion.⁶³

1. Jurisdictions Requiring a Warning or Hearing Before a Defendant Can Lose His Right to Counsel Through Delay

The approach seemingly most consistent with other precedent related to waivers of a constitutional right requires a hearing, transcribed and on the record in open court, before a defendant may lose his right to counsel as a result of his behavior.

In fact, several cases and states' approaches, though described as a waiver or forfeiture by conduct, may be more accurately described as a waiver by *inaction*—the failure to make a decision, to retain counsel, or the like.⁶⁴ A Sixth Circuit case illustrates this well. As in many other cases described here, the defendant first delayed retaining counsel, then was appointed standby counsel who later attempted to withdraw. The court's ultimate decision in that case reflected its reasoning that by rejecting all options other than self-representation (even after receiving minimum *Faretta* warnings), the defendant had effectively "chose[n] self-representation."⁶⁵

Circumstances of delay frequently occur around a defendant's financial inability to retain counsel despite not qualifying for a public defender's services. Even in these cases, so long as a defendant has been warned of the consequences, courts are empowered to find a waiver or forfeiture of counsel and his trial

⁶³ This could be the case for a number of reasons: the issue has not occurred in that jurisdiction (unlikely), the issues have not been selected for review in appellate courts, or the issues have otherwise not percolated their way into an appellate opinion.

⁶⁴ See *Alengi*, 148 P.3d at 160 (finding that defendant forfeited his right to counsel—after explicit warnings from the court—even though he made no deliberate decision to forgo that right); *City of Tacoma v. Bishop*, 920 P.2d 214, 217 (Wash. Ct. App. 1996) (appellate court requires *Faretta* warnings and a colloquy about "the nature of the charge, the maximum penalty, and technical rules that he must follow" when a defendant fails to retain counsel or delay a trial); *Trujillo v. State*, 2 P.3d 567 (Wyo. 2000) (holding that a "waiver of counsel by conduct is not knowingly and voluntarily made when the criminal defendant has not been warned that waiver will be the result of his continued dilatory and obstructive behavior").

⁶⁵ *King v. Bobby*, 433 F.3d 483, 485-86, 492 (6th Cir. 2006).

may proceed without a defense attorney's participation.⁶⁶ This is often described as a "delay" problem, though the real problem is likely one of financial reality when a criminal defendant finds himself caught between the poverty line and his available line of credit. The Fifth and Seventh Circuits similarly require a hearing before a defendant loses his right to counsel, though that right can be lost (presuming it is lost knowingly and after appropriate warnings) for failure to retain counsel. Neither circuit requires a "sacrosanct litany"⁶⁷ when explaining the risks of both failure to retain counsel and the risks of continuing without representation, but appropriate and thorough information is required in all cases.

The reverse of this circumstance involves cases in which a defendant complains about his counsel's performance—often to the level of requesting or demanding new counsel. Some of the appellate opinions examining such situations focused on the level of the defendant's understanding and perceived manipulation of the system. In two such cases, certiorari was denied after an appellate court upheld a finding of waiver/forfeiture without a full warning or hearings. In *State v. Carruthers*, the Supreme Court of Tennessee similarly held that "an indigent criminal defendant may implicitly waive or forfeit the right to counsel by utilizing that right to manipulate, delay, or disrupt trial proceedings."⁶⁸ Finding that Carruthers' conduct and dilatory behavior had escalated with the successive appointments of new counsel, and that he understood the dangers of proceeding without counsel, the appellate court explained "in situations such as this one, a trial court has no other choice but to find that a defendant has forfeited the right to counsel; otherwise, an intelligent defendant 'could

⁶⁶ *City of Grand Forks v. Corman*, 767 N.W.2d 847, 850 (N.D. 2009) ("This right to be represented by counsel may be waived or forfeited, but first the district court must inform the defendant of the right and afford a reasonable opportunity for the defendant to secure counsel."); see also *Alengi*, 148 P.3d at 161-62.

⁶⁷ *United States v. Davis*, 269 F.3d 514, 519-20 (5th Cir. 2001) (defendant was not sufficiently warned of the risks of proceeding pro se and so there was not a knowing and intelligent waiver of counsel when failing to retain counsel); *United States v. Bauer*, 956 F.2d 693, 695 (7th Cir. 1992) (minimum *Faretta* warnings required before a defendant may lose his right to representation after repeated failure to retain counsel).

⁶⁸ 35 S.W.3d 516, 549 (Tenn. 2000), cert. denied, 533 U.S. 953 (2001). On the other hand, that court opined that "the distinction between these two concepts is slight" and found both forfeiture and waiver in that case. *Id.*

theoretically go through tens of court-appointed attorneys and delay his trial for years.”⁶⁹

Previously, the Kentucky Supreme Court⁷⁰ established bright-line requirements for a *Faretta* inquiry, but this approach was later rejected in favor of a more practical and flexible approach that looked to the entire record to see if the defendant has knowingly and intelligently waived his right to counsel.⁷¹ The Kentucky Supreme Court has extended its pragmatic, flexible approach by recommending the model inquiry from the *Benchbook*⁷² but leaving open the possibility of determining sufficiency of the waiver of the right to counsel by other means—essentially holding that a *Faretta* inquiry is still a technical requirement, but that the form the inquiry takes cannot be prescribed.⁷³

In addition to requiring a hearing on the subject, some courts have found a way to further warn a defendant that his continued behavior will result in the loss of representation even when a defendant does not indicate a decision to expressly or verbally waive that right. A Missouri appellate court case has advised trial courts to prepare a written notice of waiver even where the defendant’s waiver of the right to counsel is said to be implied by his conduct.⁷⁴ In recommending the written waiver of counsel “out of an abundance of caution,” the court urged trial court judges to present the waiver to the defendant to sign so that any refusal to sign is on the record.⁷⁵

⁶⁹ *Id.* at 550 (quoting *State v. Cummings*, 546 N.W.2d 406, 419 (Wis. 1996)).

⁷⁰ *Hill v. Commonwealth*, 125 S.W.3d 221 (Ky. 2004).

⁷¹ *Depp v. Commonwealth*, 278 S.W.3d 615, 617-19 (Ky. 2009).

⁷² Section 1.02(C) of the *Benchbook* for U.S. District Court Judges provides district court judges with guidance on how to handle defendants who wish to represent themselves. FEDERAL JUDICIAL CENTER, *BENCHBOOK FOR U.S. DISTRICT COURT JUDGES* § 1.02(C) (4th ed. 2000). Namely, there is a list of fourteen suggested questions the judge should ask the defendant. See *United States v. Garey*, 540 F.3d 1253, 1267 n.8 (11th Cir. 2008) (suggesting the questions as a form of model inquiry); *United States v. McBride*, 362 F.3d 360, 366 (6th Cir. 2004) (using the questions as a model inquiry to which other inquiries should be substantially similar); *United States v. Peppers*, 302 F.3d 120, 136 (3d Cir. 2002) (recommending the questions as guidelines for inquiry). But see *United States v. Bauer*, 956 F.2d 693, 695 (7th Cir. 1992) (“[T]he catechism in the [*Benchbook*] . . . is not part of the sixth amendment.”).

⁷³ *Commonwealth v. Terry*, 295 S.W.3d 819, 822 (Ky. 2009).

⁷⁴ *State v. Wilkerson*, 948 S.W.2d 440, 444 (Mo. Ct. App. 1997).

⁷⁵ *Id.* at 445.

Each of these procedures is entirely consistent with constitutional jurisprudence on knowing and intelligent waivers. They acknowledge the dilemma of disruptive or dilatory behavior but hold that even in these problematic circumstances, a warning of some sort must be given to the defendant as though he had walked into court announcing his desire to proceed without a lawyer.

2. Jurisdictions Recommending—Not Requiring—a Hearing Before a Finding of Implicit Waiver

A number of cases have held that a hearing in circumstances of implicit waiver of the right to counsel is not required, but the courts *recommend* an on-record hearing as the preferred mechanism to determine the validity of a defendant's waiver of the right to counsel.

In *United States v. Garey*, the Eleventh Circuit explained that “the best practice is for district courts to begin by attempting to engage the defendant in a full discussion of the dangers of self-representation whenever a defendant expresses a desire to waive his right to counsel, whether affirmatively *or by his conduct*.”⁷⁶ The court distinguishes here between a dialogue or colloquy with the defendant and a mere warning, holding that a warning is sufficient, though an on-record colloquy is preferable.⁷⁷

In Maine, a defendant may waive his right to counsel by causing a delay or by obstructing the court process without having first been warned, but only under unusual circumstances.⁷⁸ Though a waiver apart from an in-court warning should be unusual, “[a] defendant’s ‘stubborn failure’ to hire counsel or apply for court-appointed counsel . . . may form the basis for a voluntary, knowing, and intelligent waiver if the court also finds that the

⁷⁶ 540 F.3d 1253, 1267 (11th Cir. 2008) (emphasis added) (adding that “[a] dialogue cannot be forced; therefore, when confronted with a defendant who has voluntarily waived counsel by his conduct and who refuses to provide clear answers to questions regarding his Sixth Amendment rights, it is enough for the court to inform the defendant unambiguously of the penalties he faces if convicted and to provide him with a general sense of the challenges he is likely to confront as a pro se litigant”).

⁷⁷ *Id.* at 1269-70.

⁷⁸ *State v. Watson*, 900 A.2d 702 (Me. 2006).

defendant fully understood the right to counsel and the dangers of self-representation *apart from the court's Fareta warnings*.”⁷⁹

Utah has a similar approach.⁸⁰ The Utah Supreme Court noted, however, that the case presented was “a prime example of the confusion and inconsistency that can permeate proceedings in the absence of an explicit warning and colloquy regarding the right to counsel.”⁸¹

3. When a Hearing is Not Required or Recommended After Dilatory Conduct

Not all jurisdictions, however, require that trial courts warn defendants in a hearing or colloquy—many have held that it is sufficient if the “entire record” demonstrates that the defendant understands the risks of continued dilatory or obstructionist behavior. As discussed above, most courts recommend a hearing or colloquy of some sort before a waiver is found, but some jurisdictions have failed to even recommend a hearing under circumstances of dilatory or other difficult conduct.

In Georgia, the supreme court has made clear “that it is not incumbent upon the trial court to make each of these inquiries [relating to the nature of the charges, the range of allowable punishments, potential defenses and mitigating circumstances, and any lesser included offenses].”⁸² So long as the record as a whole reflects that a defendant understands these matters, a hearing may not be required before he loses his right to counsel.⁸³

⁷⁹ *Id.* at 712 (emphasis added) (internal citation omitted).

⁸⁰ *State v. Pedockie*, 137 P.3d 716, 724 (Utah 2006) (“While we have urged that trial courts engage in an on-the-record colloquy with defendants to ensure that they are aware of the dangers . . . of self-representation, we have not imposed an absolute requirement that they do so.”).

⁸¹ *Id.* at 725; *see also* *United States v. Crawford*, 487 F.3d 1101, 1105-06 (8th Cir. 2007) (a defendant's waiver will be upheld if either “(1) the district court adequately warns the defendant about the dangers and disadvantages of proceeding pro se or (2) the record as a whole demonstrates ‘that the defendant knew and understood the disadvantages of self-representation.’ An on-the-record colloquy is . . . recognized as the preferred [but not required] method . . .” (quoting *Gladden v. State*, 110 P.3d 1006 (Alaska Ct. App. 2005))).

⁸² *Jones v. State*, 536 S.E.2d 511, 513 (Ga. 2000).

⁸³ *See Harris v. State*, 27 So. 3d 582 (Ala. 2008); *People v. Tucker*, 889 N.E.2d 733 (Ill. App. Ct. 2008).

In these cases, absence from one's trial seems to complicate both the analysis and the outcome. In a South Carolina case complicated by the defendant's absence from his trial, the court found a waiver by conduct of the right to counsel "inferable" from the defendant's actions and "[found] . . . *Faretta* inapplicable to the instant case."⁸⁴ Formalistically finding that since the defendant had not indicated that he wished to proceed pro se, *Faretta* did not apply. This is true, of course, but the jurisprudence of waiver leading to *Faretta* went unexamined.⁸⁵ Likewise, the defendant's absence seems to be a dispositive factor in Indiana's consideration of the implicit waiver issue.⁸⁶

B. The Loss of Counsel After Defendants' "Egregious Conduct"

1. States Which Do Not First Require a Hearing

Some jurisdictions do not require a hearing before a defendant loses his right to representation as a direct and immediate result of "egregious behavior"—usually actual or threatened violence. The theory, perhaps, is that the defendant's behavior is so extreme as to make a hearing inappropriate, or that some behavior is automatically understood to justify waiver. Yet these jurisdictions define "egregious" along different points of a spectrum and make no clearer differentiation between the need for counsel at pre-trial or trial proceedings than any other jurisdictions discussed herein.

In *Gilchrist v. O'Keefe*, the Second Circuit acknowledged the doctrine and analyzed it along the line of cases allowing forfeiture of presence at trial (rather than along the line of *Faretta* and its progeny). In that case, the court concluded that hearings and warnings are not constitutionally required in forfeiture circumstances,⁸⁷ which are typically triggered by violence or

⁸⁴ *State v. Roberson*, 675 S.E.2d 732, 733 (S.C. 2009).

⁸⁵ *Id.* at 733-34.

⁸⁶ *Jackson v. State*, 868 N.E.2d 494 (Ind. 2007). "[The court] cannot expect a trial court to hunt down a defendant to admonish him about the dangers and disadvantages of self-representation if the defendant has made no indication to the trial court that he intends to proceed pro se and then subsequently does not show up for trial." *Id.* at 501.

⁸⁷ *Gilchrist v. O'Keefe*, 260 F.3d 87, 97 (2d Cir. 2001). "Here, however, given the Supreme Court's recognition that other important constitutional rights may be forfeited based on serious misconduct, we cannot say that the state courts were

threats of violence. Similarly, in *United States v. Leggett*, the Third Circuit found a valid forfeiture of counsel—without requiring a hearing—when the defendant punched, attacked, and spat upon his attorney.⁸⁸ Further, when the defendant in *United States v. Thompson* threatened to kill his appellate attorney, the Eighth Circuit upheld the lower court's finding that he had forfeited—without a hearing or warning—his right to counsel.⁸⁹

Just as one begins to believe that physical violence might be the hallmark of “egregious conduct” that always leads to an immediate forfeiture of counsel, there is a twist in the authority. Consider the Delaware Supreme Court's explanation that “[v]iolence is not the *sine qua non* of extremely serious misconduct,” such that so long as the conduct is “sufficiently egregious, it will constitute forfeiture.”⁹⁰ This can occur regardless of whether the defendant has received a warning indicating that his actions could lead to a forfeiture or the disadvantages of proceeding as a pro se litigant. Similarly, another intriguing approach is a hybrid forfeiture procedure, requiring a hearing in the “gray area” sorts of cases and conduct. For example, in California's *King v. Superior Court*, readers learn that “in instances where the misconduct does not rise to the most serious level, a warning should be given. The warning will serve to alert the defendant to the seriousness of his misconduct and perhaps

unreasonable in determining that the right to counsel could be forfeited based on petitioner's physical assault on his attorney.” *Id.*

⁸⁸ 162 F.3d 237, 250 (3d Cir. 1998), *cert. denied*, 528 U.S. 868 (1999). The defendant's “unprovoked physical battery” of his counsel qualifies as the type of “extremely serious misconduct” meriting a forfeiture of the right to counsel, “regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right.” *Id.*; *see also* *People v. Smith*, 705 N.E.2d 1205 (N.Y. 1998) (finding waiver of right to counsel where defendant threatened his attorney exclaiming that, if convicted, he would put a knife in the attorney's head).

⁸⁹ 335 F.3d 782, 785 (8th Cir. 2003), *cert. denied*, 540 U.S. 1134 (2004). “A criminal defendant may, however, by virtue of his actions forfeit his constitutional rights.” *Id.*; *see also* *United States v. McLeod*, 53 F.3d 322, 325 (11th Cir. 1995) (defendant engaged in “pervasive misconduct” that was egregious enough to warrant forfeiture of the right to counsel); *State v. Rasul*, 167 P.3d 1286, 1289 (Ariz. Ct. App. 2007) (“Forfeiture, only appropriate in cases of ‘severe misconduct or a course of disruption aimed at thwarting judicial proceedings,’ does not require a prior warning.”).

⁹⁰ *Bultron v. State*, 897 A.2d 758, 765-66 (Del. 2006) (quoting *United States v. Thomas*, 357 F.3d 357, 363 (3d Cir. 2004)); *see also* *Gilchrist*, 260 F.3d at 100 (“[W]e do not mean to suggest that any physical assault by a defendant on counsel will automatically justify constitutionally a finding of forfeiture of the right to counsel.”).

forestall future misconduct.”⁹¹ In *King*, however, the defendant (who did receive a warning) had grabbed his first attorney and threatened a second, and there is little guidance given about how “serious misconduct” might be defined.

2. Loss of Counsel Through Egregious Conduct Possible After a Hearing

One of the most recent—and more comprehensive—explorations of this appears in *Commonwealth v. Means*.⁹² Forfeiture, it explains, should be a “last resort” response to only the “grave[st] and [most] deliberate” misconduct, “in light of the fundamental constitutional rights at stake.”⁹³ *Means* emphasized both that “denying an indigent defendant the assistance of counsel at trial or otherwise” is an “extreme sanction,” and that the appropriate response is “a hearing at which the defendant has a full and fair opportunity to offer evidence as to the totality of the circumstances that may bear on the question whether the sanction of forfeiture is both warranted and appropriate.”⁹⁴

In *Bultron v. State*, Delaware’s key forfeiture case, the court makes clear that, “the trial judge must first give certain warnings”—in both waiver and waiver by conduct cases—“before a trial court may determine that a defendant has waived his right to counsel and must proceed pro se.”⁹⁵ The court further clarified, citing to both *Faretta* and *Goldberg*, “to the extent that the defendant’s actions are examined under the doctrine of ‘waiver,’ there can be no valid waiver of the Sixth Amendment right to counsel unless the defendant also receives *Faretta* warnings.”⁹⁶

⁹¹ 132 Cal. Rptr. 2d 585, 596 (Cal. Ct. App. 2003). The court further stated:

Balancing the great importance of the right to counsel against the need to protect counsel and the orderly administration of justice, we conclude an accused may forfeit his right to counsel by a course of serious misconduct towards counsel that illustrates that lesser measures to control defendant are insufficient to protect counsel and appointment of successor counsel is futile.

Id. at 588.

⁹² 907 N.E.2d 646 (Mass. 2009).

⁹³ *Id.* at 652, 660.

⁹⁴ *Id.* at 652.

⁹⁵ 897 A.2d 758, 764 (Del. 2006).

⁹⁶ *Id.* (quoting *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995)).

Tennessee falls into this category as well, requiring a hearing (at which the defendant is present and permitted to testify) before forfeiture can be found.⁹⁷ Notably, that state classifies an attack upon counsel as “serious misconduct” but not necessarily as “*extremely* serious misconduct sufficient to warrant forfeiture of counsel at trial without prior warning.”⁹⁸

Gray v. Moore very explicitly took on the reasoning that underlies other jurisdictions’ acceptance of the *Allen-Gilchrist-McLeod* cases allowing forfeiture without a warning or hearing.⁹⁹ “[I]n light of the explicit language used by the Supreme Court,” it explained, “we conclude that the Ohio appellate court unreasonably applied *Allen* when it affirmed Gray’s removal despite the absence of a prior warning by the trial court.”¹⁰⁰ However, “no action against an unruly defendant is permissible except after he has been fully and fairly informed that his conduct is wrong and intolerable, and warned of the possible consequences of continued misbehavior.”¹⁰¹ Further, the Sixth Circuit declined to accept a true forfeiture doctrine as established in cases like *Gilchrist* and *McLeod* because the defendant had not exhibited behavior that was extreme enough to warrant a sanction without a warning as required by *Illinois v. Allen*.¹⁰²

C. Concluding Tallies and Synthesis of the Cases and Splits

After a thorough review of the available appellate cases, circuit and state splits as related to courts’ procedures regarding a

⁹⁷ Another case espousing similar tenets, but not discussed here in detail, is *United States v. Sutcliffe*, 505 F.3d 944 (9th Cir. 2007) (recognizing that defendant implicitly waived his right to counsel after being warned he would lose the right if he persisted in sabotaging his relationships with his attorneys).

⁹⁸ *State v. Holmes*, 302 S.W.3d 831, 847 (Tenn. 2010). The court stated:

We do not imply by our decision in this case that a criminal defendant may not be found to have forfeited his right to counsel in the absence of a physical assault. A forfeiture (or an implicit waiver) may withstand constitutional scrutiny where, for instance, a defendant repeatedly threatens harm to his lawyer and/or his lawyer’s family and it is apparent that the defendant has the ability to deliver on his threats.

Id. at 847 n.10.

⁹⁹ 520 F.3d 616 (6th Cir. 2008).

¹⁰⁰ *Id.* at 623.

¹⁰¹ *Id.*

¹⁰² 397 U.S. 337, 346 (1970).

defendant's delay or "egregious conduct" come into relief. Of course, some jurisdictions do not recognize either of the doctrines of forfeiture or waiver by conduct,¹⁰³ while others have no authority for one doctrine¹⁰⁴ or the other.¹⁰⁵

Of the jurisdictions recognizing the doctrine of forfeiture or the loss of counsel after the manifestation of "egregious conduct," a number of these states¹⁰⁶ and federal circuits¹⁰⁷ require a defendant to have been warned in a court hearing. One example of this approach is illustrated by *Commonwealth v. Means*, which requires a "full and fair opportunity" to be heard before a court may impose "the extreme sanction of denying an indigent defendant the assistance of counsel."¹⁰⁸

On the other hand is Delaware's rule, which unapologetically allows for an immediate loss of counsel "[i]f a defendant's behavior is sufficiently egregious" (whatever that may mean) and requiring

¹⁰³ An exhaustive search revealed that the following are jurisdictions that do not recognize the loss of counsel through *either* egregious or dilatory conduct: First Circuit, Fourth Circuit, Tenth Circuit, Connecticut, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, South Dakota, Texas, Vermont, Virginia, and West Virginia.

¹⁰⁴ After an exhaustive search, the following jurisdictions presented no appellate court authority recognizing the loss of counsel through *dilatory conduct*: Second Circuit, Ninth Circuit, California, Delaware, Massachusetts, New York, and North Carolina.

¹⁰⁵ A similarly thorough search revealed no appellate court authority for the loss of counsel through *egregious conduct* in the following jurisdictions: Fifth Circuit, Seventh Circuit, Alabama, Alaska, Arkansas, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kentucky, Maine, Maryland, Minnesota, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Utah, Washington, Wisconsin, and Wyoming.

¹⁰⁶ These states require a hearing, warning, or colloquy before removing counsel from a defendant who engages in *egregious conduct*: Delaware (*Bultron v. State*, 897 A.2d 758, 765 (Del. 2006)); Massachusetts (*Commonwealth v. Means*, 907 N.E.2d 646, 658 (Mass. 2009)); New York (*People v. Smith*, 705 N.E.2d 1205, 1208 (N.Y. 1998)); Tennessee (*State v. Holmes*, 302 S.W.3d 831 (Tenn. 2010)).

¹⁰⁷ The Sixth Circuit (*Gray v. Moore*, 520 F.3d 616, 620 (6th Cir. 2008)) and Ninth Circuit (*United States v. Sutcliffe*, 505 F.3d 944, 954 (9th Cir. 2007)) require a hearing, warning, or colloquy before removing counsel from a defendant who engages in *egregious conduct*.

¹⁰⁸ 907 N.E.2d 646, 652 (Mass. 2009).

no “*Faretta* warnings or a warning to discontinue disruptive conduct.”¹⁰⁹

The Second, Third, Eighth, and Eleventh Circuits do not require a hearing, warning, or colloquy before removing counsel from a defendant who engages in egregious conduct.¹¹⁰ Several states also follow this approach,¹¹¹ and this creates both a circuit and state split on procedures related to egregious conduct.

Similarly, related to a defendant’s persistent inaction, delay, or failure to retain counsel, some jurisdictions, such as the Eleventh Circuit, hold “in some instances a defendant’s conduct will reveal a voluntary decision to choose the path of self-representation over the continued assistance of counsel” and “[s]o long as a defendant knows the risks associated with self-representation, it is irrelevant for constitutional purposes whether his understanding comes from a colloquy with the trial court, a conversation with his counsel, or his own research or experience.”¹¹² The Third Circuit¹¹³ and a number of states¹¹⁴ have followed this approach.

¹⁰⁹ *Bultron v. State*, 897 A.2d 758, 765 (Del. 2006) (quoting *United States v. Thomas*, 357 F.3d 357, 363 (3d Cir. 2004)).

¹¹⁰ See *United States v. Thompson*, 335 F.3d 782, 785 (8th Cir. 2003); *Gilchrist v. O’Keefe*, 260 F.3d 87, 95 (2d Cir. 2001); *United States v. Leggett*, 162 F.3d 237, 250 (3d Cir. 1998); *United States v. McLeod*, 53 F.3d 322, 324-25 (11th Cir. 1995).

¹¹¹ These states do not require a hearing, warning, or colloquy before removing counsel from a defendant who engages in *egregious conduct*: Arizona (*State v. Rasul*, 167 P.3d 1286, 1289 (Ariz. Ct. App. 2007)); California (*King v. Superior Court*, 132 Cal. Rptr. 2d 585, 592 (Cal. Ct. App. 2003)); New York (*People v. Smith*, 92 N.Y.2d 516, 521 (N.Y. 1998)); North Carolina (*State v. Montgomery*, 530 S.E.2d 66, 69 (N.C. Ct. App. 2000)).

¹¹² *Jones v. Walker*, 540 F.3d 1277, 1289, 1293 (11th Cir. 2008).

¹¹³ The Third Circuit does not require a hearing, warning, or colloquy to remove counsel from a defendant for *dilatory conduct*. See *United States v. Kosow*, 400 F. App’x 698, 702 (3d Cir. 2010); *United States v. Thomas*, 357 F.3d 357, 362 (3d Cir. 2004).

¹¹⁴ These states do not require a hearing, warning, or colloquy to remove counsel from a defendant for *dilatory conduct*: Alabama (*Harris v. State*, 27 So. 3d 582, 586 (Ala. 2008)); Alaska (*Gladden v. State*, 110 P.3d 1006, 1011 (Alaska Ct. App. 2005)); Georgia (*Jones v. State*, 536 S.E.2d 511, 513 (Ga. 2000)); Illinois (*People v. Tucker*, 889 N.E.2d 733, 739 (Ill. App. Ct. 2008)); Indiana (*Jackson v. State*, 868 N.E.2d 494, 503 (Ind. 2007)); Maine (*State v. Watson*, 900 A.2d 702 (Me. 2006)); North Carolina (*State v. Montgomery*, 530 S.E.2d 66, 69 (N.C. Ct. App. 2000)); Pennsylvania (*Commonwealth v. Lucarelli*, 971 A.2d 1173 (Pa. 2009)); Rhode Island (*State v. Snell*, 892 A.2d 108, 120 (R.I. 2006)); South Carolina (*State v. Roberson*, 675 S.E.2d 732, 733 (S.C. 2009)); Utah (*State v. Pedockie*, 137 P.3d 716, 722 (Utah 2006)); Wisconsin (*State v. Cummings*, 546 N.W.2d 406, 418 (Wis. 1996)).

Other state courts, such as those in Colorado and Delaware, have a vastly different practice.¹¹⁵ Allowing for the possibility of a waiver triggered by disruptive conduct, Colorado makes clear that “[a] defendant may waive assistance of counsel either expressly or impliedly through his or her conduct.”¹¹⁶ However, citing presumptions against the waiver of a constitutional right, appellate courts make clear that trial courts have a duty “to make a careful inquiry about the defendant’s right to counsel and his or her desires regarding legal representation.”¹¹⁷ In Delaware, a “waiver by conduct” requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding *pro se*.¹¹⁸ This stands in contrast to Delaware’s rule that forfeiture may be imposed for violent or especially outrageous behavior (without warnings, colloquy, or a hearing).¹¹⁹ Likewise, in contrast to those identified above, a number of federal circuits have made the same determination: counsel may not be lost without an in-court inquiry on the subject of whether the defendant understands the risks of his behavior and the risks of proceeding without counsel.¹²⁰

¹¹⁵ These states require a hearing, warning, or colloquy before removing counsel from a defendant who engages in *dilatory conduct*: Arizona (*Hampton v. State*, 92 P.3d 871 (Ariz. 2004)); Arkansas (*Beyer v. State*, 962 S.W.2d 751, 754 (Ark. 2004)); California (*King v. Superior Court*, 132 Cal. Rptr. 2d 585 (Cal. Ct. App. 2003)); Colorado (*People v. Alengi*, 148 P.3d 154, 159 (Colo. 2006)); Delaware (*Bultron v. State*, 897 A.2d 758, 764 (Del. 2006)); Florida (*Waterhouse v. State*, 596 So. 2d 1008, 1014 (Fla. 1992)); Hawaii (*State v. Maelega*, 88 P.3d 1208 (Haw. 2004)); Idaho (*State v. Lindsay*, 864 P.2d 663, 666 (Idaho Ct. App. 1993)); Kentucky (*Depp v. Commonwealth*, 278 S.W.3d 615 (Ky. 2009)); Maryland (*Felder v. State*, 666 A.2d 872, 876 (Md. 1995)); Massachusetts (*Commonwealth v. Means*, 907 N.E.2d 646, 652 (Mass. 2009)); Minnesota (*State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009)); North Dakota (*City of Grand Forks v. Corman*, 767 N.W.2d 847, 850 (N.D. 2009)); Ohio (*State v. Constable*, No. CA2003-12-107, 2005 WL 637792 (Ohio Ct. App. Mar. 21, 2005)); Tennessee (*State v. Carruthers*, 35 S.W.3d 516, 549 (Tenn. 2000)); Washington (*City of Tacoma v. Bishop*, 920 P.2d 214, 219 (Wash. Ct. App. 1996)); Wyoming (*Trujillo v. State*, 2 P.3d 567, 575 (Wyo. 2000)).

¹¹⁶ *People v. Alengi*, 148 P.3d 154, 159 (Colo. 2006).

¹¹⁷ *Id.*

¹¹⁸ *Bultron v. State*, 897 A.2d 758, 764 (Del. 2006) (citing *United States v. Goldberg*, 67 F.3d 1092, 1101 (3d Cir. 1995)).

¹¹⁹ *Id.*

¹²⁰ These circuits require a hearing, warning, or colloquy before removing counsel from a defendant who engages in *dilatory conduct*: Fifth Circuit (*United States v. Davis*, 269 F.3d 514 (5th Cir. 2001)), Sixth Circuit (*King v. Bobby*, 433 F.3d 483 (6th

III. THE U.S. SUPREME COURT'S . . . OPINION?

The United States Supreme Court has found no reason to differentiate between a waiver of counsel expressed through words and a waiver of counsel expressed through conduct—and its only word on waiver of counsel requires a hearing and a knowing, intelligent, and voluntary relinquishment.

If examining *Boykin*, *Faretta*, and the “knowing, intelligent, and voluntary” jurisprudence on the one hand, and this body of forfeiture and implicit waivers on the other, something seemingly does not quite fit with cases allowing a waiver without warning. Those cases holding the same or similar view to the following—“A ‘waiver by conduct’ requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding pro se”¹²¹—seem the most constitutionally sound and allow trial courts the flexibility of finding a forfeiture or waiver while still protecting a defendant’s rights. The United States Supreme Court has not addressed the issue of the constitutionality of forfeiture or of implicit waiver. As the Ninth Circuit Court of Appeals has recently acknowledged, “Although the Supreme Court has never directly held that the right to counsel can be forfeited, the Court has also never held to the contrary”¹²²

While true, denial of certiorari, however, is difficult to decipher. Traditionally, students of law learn the “orthodox view” that the denial of certiorari is not an indication of the Court’s view on the merits of a case.¹²³ Some have been so glib as to suggest the process as the product of a “a fit of absentmindedness” or a matter of “serendipity.”¹²⁴ The Court’s own explanations include a disclaimer that a denial of certiorari means only that “for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits

Cir. 2006)), Seventh Circuit (*United States v. Bauer*, 956 F.2d 693 (7th Cir. 1992)), Eighth Circuit (*United States v. Crawford*, 487 F.3d 1101 (8th Cir. 2007)).

¹²¹ *Bultron*, 897 A.2d at 764 (citing *United States v. Goldberg*, 67 F.3d 1092, 1101 (3d Cir. 1995)).

¹²² *Chandler v. Blackletter*, 366 F. App’x 830 (9th Cir. 2010).

¹²³ See Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1228 (1979).

¹²⁴ Book Review, *The Uncertainty of Cert*, 105 HARV. L. REV. 1795 (1992) (reviewing H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991)).

taken by a majority of the Court, there were not four members of the Court who thought the case should be heard.”¹²⁵

In at least some instances, a denial of certiorari is a simple way of affirming a lower court decision.¹²⁶ However, it has also been suggested that although it is wise practice to be wary of attributing a decision on the merits to a denial of certiorari, denial *may* offer tentative views on the merits that are helpful in predicting the course of future developments. Denial may be particularly meaningful if there are obvious factors that would call for review if the lower court's decision seemed wrong. The most useful of these factors are the apparent national importance of the case denied review, the existence of a conflict in lower court decisions, or the presence of a strong dissent from the denial of review.¹²⁷

The problem with assuming this to be the case with forfeiture or constructive waiver cases is that the Court has denied certiorari in a number of cases standing for opposite propositions. A number of legal teams have sought United States Supreme Court review on related issues—all without success. The most recent of these are described below, though as described in Section I, the Court has denied certiorari in these issues since the early 1940s.¹²⁸

A. Loss of Counsel Requiring a Hearing

Of the denials of certiorari discovered during research for this Article, a number of these were in cases ultimately requiring some sort of hearing on the record before a defendant was able to waive counsel with his conduct. *United States v. Bauer*, for one, held that *Faretta* did not preclude the concept of waiver by conduct so long as a defendant receives minimal warnings on the record.¹²⁹ Applying similar reasoning, the Ninth Circuit in *United States v.*

¹²⁵ *Brown v. Allen*, 344 U.S. 443, 491-92 (1953) (Justice Frankfurter explaining the position of the Court).

¹²⁶ Linzer, *supra* note 123, at 1283-86.

¹²⁷ *Id.* at 1304.

¹²⁸ *Spevak v. United States*, 158 F.2d 594 (4th Cir. 1947).

¹²⁹ *United States v. Bauer*, 956 F.2d 693, 695 (7th Cir. 1992), *cert. denied*, 506 U.S. 882 (1992). Under *Faretta*, the court was required to give the defendant warning about *pro se* representation, which it did, but nothing more. *Id.*

Meeks determined that the defendant's right to counsel had been violated by the trial court's finding of a waiver by conduct.¹³⁰ The Sixth Circuit in *King v. Bobby* held that even though the defendant actually signed a waiver of counsel, when he did not expressly waive his right to representation, he was entitled to "the minimum" *Faretta* warnings.¹³¹

United States v. Garey offered a slightly different approach to the issue, requiring warnings before finding a constructive waiver but not necessarily a dialogue or colloquy with the defendant.¹³² The Eleventh Circuit also acknowledged the lack of guidance from the United States Supreme Court.¹³³ The opinion includes strong, clear language about the importance of protecting defendants' right to counsel:

We continue to stress that when a right as fundamental as the right to counsel is at stake, it is important for trial courts to do all in their power to ensure every defendant, from the most cooperative to the most obstreperous, is informed of the risks of proceeding pro se and is prevented from waiving counsel without sufficient knowledge of the protections he is surrendering. . . . To that end, the best practice is for district courts to begin by attempting to engage the defendant in a full discussion of the dangers of self-representation whenever a defendant expresses a desire to waive his right to counsel, whether affirmatively or by his conduct.¹³⁴

And so, while the Eleventh Circuit requires no magic words on the subject, at least in relation to dilatory conduct, it does not allow

¹³⁰ 987 F.2d 575, 579 (9th Cir. 1993), *cert. denied*, 510 U.S. 919 (1993). "The court did not make Meeks aware of the dangers of proceeding pro se, nor does the record indicate that he knew of them." *Id.*

¹³¹ *King v. Bobby*, 433 F.3d 483 (6th Cir. 2006), *cert. denied*, 549 U.S. 1001 (2006).

¹³² *United States v. Garey*, 540 F.3d 1253, 1267-68 (11th Cir. 2008), *cert. denied*, 555 U.S. 1144 (2009) ("[A] *Faretta*-like monologue will suffice. . . . [I]t is enough for the court to inform the defendant unambiguously of the penalties he faces if convicted and to provide him with a general sense of the challenges he is likely to confront as a pro se litigant.").

¹³³ *Id.* at 1263 ("The Supreme Court has never confronted a case in which an uncooperative defendant has refused to accept appointed counsel or engage in a colloquy with the court. Consequently, the Court has never been asked to determine whether a defendant may waive counsel without making an explicit, unqualified request to represent himself.").

¹³⁴ *Id.* at 1267.

lower courts to impute understanding to defendants about the consequences of their conduct or of their (eventual) loss of the right to counsel.

Similarly, the United States Supreme Court denied certiorari for *State v. Jones*.¹³⁵ In *Jones*, the trial court conducted a brief colloquy during which Jones acknowledged that he had the right to an attorney, but that he did not qualify for representation by a public defender.¹³⁶ Although after appropriate warnings, he agreed that he would represent himself, Jones told the trial court that he considered himself “a sitting duck, basically a target” without counsel.¹³⁷ Although the appellate court held the record did not support a conclusion that Jones had waived his right to counsel, it held that Jones had *forfeited* it in his extremely dilatory conduct and failure to engage counsel despite acknowledging the risks of proceeding pro se.¹³⁸ The court in *Wilkerson v. Klem* reached a similar conclusion, upholding a finding of forfeiture of counsel without the defendant having received a full warning on the record about the risks of self-representation.¹³⁹

B. Loss of Counsel Not Requiring a Hearing

Not all of the cases in which certiorari was sought and denied were cases in which a hearing was held, or later held to be required. Although the defendant in *Jones v. Walker* repeatedly asserted his wish for representation (as he requested new counsel), the Eleventh Circuit found the “functional equivalent” of a valid waiver.¹⁴⁰ The dispositive fact in *Jones*—in seeming direct contradiction to that Eleventh Circuit’s holding in *United States v.*

¹³⁵ *State v. Jones*, 772 N.W.2d 496 (Minn. 2009), *cert. denied*, 130 S. Ct. 3275 (2010).

¹³⁶ *Id.* at 502.

¹³⁷ *Id.* at 506.

¹³⁸ *Id.*

¹³⁹ *Wilkerson v. Klem*, 412 F.3d 449, 454 (3d Cir. 2005), *cert. denied*, 547 U.S. 1051 (2005). The Third Circuit noted that “[w]hile the Superior Court quoted this passage from *Wentz* cast in terms of ‘waiver,’ it made clear that this was a case in which the defendant had forfeited his right to counsel by his conduct and not one involving a voluntary waiver of that right.” *Id.* at 452.

¹⁴⁰ *Jones v. Walker*, 540 F.3d 1277, 1286 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 1670 (2009). “So long as a defendant knows the risks associated with self-representation, it is irrelevant for constitutional purposes whether his understanding comes from a colloquy with the trial court, a conversation with his counsel, or his own research or experience.” *Id.* at 1293.

Garey (discussed *supra*)—was a finding of the defendant's understanding of the risks of self-representation, regardless of the source of that understanding.¹⁴¹ *United States v. Hughes*, for one, acknowledged that a colloquy would have been "preferable" but held that when the defendant delayed retaining counsel, "[t]he facts and circumstances in this case support a valid waiver by conduct."¹⁴² *Sullivan v. Pitcher* likewise upheld a waiver despite explicit warnings.¹⁴³ Under those circumstances, the Sixth Circuit announced that "a formal inquiry is not a sine qua non of constitutional waiver"¹⁴⁴ and that "Sullivan was acutely aware of his right to counsel and the risks of proceeding pro se, and his waiver of that right and his decision to proceed in the face of such risks was undeniably 'knowingly and intelligently' made."¹⁴⁵

Several cases focused on the level of the defendant's understanding and perceived manipulation of the system. In two such cases, certiorari was denied after an appellate court upheld a finding of waiver/forfeiture without a full warning or hearings. In *State v. Carruthers*, the Supreme Court of Tennessee similarly held that "an indigent criminal defendant may implicitly waive or forfeit the right to counsel by utilizing that right to manipulate, delay, or disrupt trial proceedings."¹⁴⁶ Finding that Carruthers' conduct and dilatory behavior had escalated with the successive appointments of new counsel, and that he understood the dangers of proceeding without counsel, the court explained "in situations such as this one, a trial court has no other choice but to find that a defendant has forfeited the right to counsel; otherwise, an

¹⁴¹ *Id.*; cf. *United States v. Garey*, 540 F.3d 1253, 1267 (11th Cir. 2008).

¹⁴² *United States v. Hughes*, 191 F.3d 1317, 1324 (10th Cir. 1999), *cert. denied*, 529 U.S. 1022 (2000).

¹⁴³ *Sullivan v. Pitcher*, 82 F. App'x 162, 165 (6th Cir. 2003), *cert. denied*, 541 U.S. 991 (2004).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* "In circumstances such as the instant one—when all the evidence supports the conclusion that the Sixth Amendment is being used not as a shield but as a sword—other courts have not hesitated to find waiver through conduct." *Id.* at 165-66 (citing *United States v. Irerere*, 228 F.3d 816, 826 (7th Cir. 2000)) (noting that "a defendant may waive his right to counsel through his own contumacious conduct"); *United States v. Goldberg*, 67 F.3d 1092, 1110 (3d Cir. 1995) (describing waiver by conduct as a "hybrid" situation that combines elements of waiver and forfeiture).

¹⁴⁶ *State v. Carruthers*, 35 S.W.3d 516, 549 (Tenn. 2000). On the other hand, that court opined that "the distinction between these two concepts is slight" and found both forfeiture and waiver in that case. *Id.*

intelligent defendant 'could theoretically go through tens of court-appointed attorneys and delay his trial for years.'"¹⁴⁷ The court in *State v. Pride* similarly upheld a finding of waiver of counsel after the defendant failed to work with his public defender, failed to officially hire private counsel, and failed to appear for trial.¹⁴⁸ The fact that the court viewed Pride as having "knowingly attempted to manipulate the court system" was dispositive.¹⁴⁹ The court also found the lack of a *Faretta*-type warning or waiver irrelevant, since Pride had never indicated a wish to represent himself.¹⁵⁰

Most denials of certiorari involving forfeiture were in cases holding that no warning or hearing was required under those extreme circumstances existing in each case: death threats against counsel, kicking, punching, and the like.¹⁵¹ In its own consideration of the issue, the Third Circuit discussed the absence of Supreme Court precedent. This was particularly relevant under the circumstances of federal habeas review regarding whether there was a prior decision of the Supreme Court involving facts "materially indistinguishable" from those presented in this case and whether the lower court's opinion was "contrary to . . . clearly established Supreme Court law."¹⁵² "It remains true," the court explained, "that there are no Supreme Court decisions involving forfeiture of the right to counsel and *a fortiori* no decisions providing any clear guidance as to the 'standard to be applied

¹⁴⁷ *Id.* at 550.

¹⁴⁸ *State v. Pride*, No. 2007-UP-544, 2007 S.C. App. LEXIS 48, at *12-13 (S.C. Ct. App. Aug. 24, 2007), *cert. denied*, 130 S. Ct. 3468 (2010).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at *13-15 ("Additionally, we reject Pride's contention that his convictions should be reversed because the trial judge failed to admonish him regarding the dangers and disadvantages of self-representation pursuant to [*Faretta*]. . . . At no point did Pride indicate that he wanted to represent himself. Instead, he consistently communicated to the court and his court-appointed attorney that he wanted to retain a private attorney.").

¹⁵¹ *Gilchrist v. O'Keefe*, 260 F.3d 87, 89-90 (2d Cir. 2001). "Here, however, given the Supreme Court's recognition that other important constitutional rights may be forfeited based on serious misconduct, we cannot say that the state courts were unreasonable in determining that the right to counsel could be forfeited based on petitioner's physical assault on his attorney." *Id.* at 97; *see also* *United States v. Thompson*, 335 F.3d 782, 785 (8th Cir. 2003) ("A criminal defendant may, however, by virtue of his actions forfeit his constitutional rights."); *United States v. Leggett*, 162 F.3d 237, 240, 250 (3d Cir. 1998).

¹⁵² *Wilkerson v. Klem*, 412 F.3d 449, 454 (3d Cir. 2005), *cert. denied* 547 U.S. 1051 (2006).

before [it can be concluded that] a defendant's misconduct warrants a forfeiture."¹⁵³

Scholars, then, can make little of the meaning of these repeated denials of certiorari, as denials are equally as likely to be returned in cases requiring a more traditional waiver of counsel as cases that allow forfeiture without offering the defendant a warning or opportunity to adapt his behavior to an understanding of potential consequences. Why is it, then, that such important constitutional questions remain unaddressed by the Supreme Court? These questions are now being raised often enough—and on rather fundamental constitutional law issues—that it is difficult to imagine the Court to be disinterested in the issue.

As state and federal appellate courts blunder on their own, cases and circumstances raising significant constitutional concerns persist. While many crave the attention of our High Court, these questions cry out for guidance and clarity.

IV. MAKING SENSE OF THE PROBLEM: DOES THE RIGHT TO COUNSEL REALLY DEPEND ON GEOGRAPHY?

Evidently, court opinions on this topic range considerably (which is not unusual, considering most jurisdictions approach many criminal law matters with local flavor), with no forthcoming magic bullet from the Supreme Court. The unique issue here is that there is such variety in defining and approaching a constitutional criminal law matter on which there exists otherwise clear jurisprudence. Does conduct really create a set of problems that justify deviation from precedent on waiver of counsel? Or are these sets of cases aberrations crying out for a new set of legal responses (if not a Supreme Court opinion)? Depending on the location of an alleged crime, a defendant may be at risk for losing his right to counsel with no prior information about potential landmines, a warning and opportunity to modify behavior, or a hearing.

Variety is one thing. Variety on a fundamental constitutional question—particularly when definitions of the doctrines, triggering behavior, and appropriate responses are so vague—is troublesome.

¹⁵³ *Id.* at 454-55 (citing *Fischetti v. Johnson*, 384 F.3d 140, 152 (3d Cir. 2004)).

Consider these scenarios as examples of the disparity of approaches:

Scenario 1: Defendant does not want to waive counsel but is not happy with counsel's performance. The court refers to the dangers of proceeding pro se, but the defendant nevertheless fires counsel on the eve of trial. Without further warning or a hearing, he is forced to proceed pro se.

Scenario 2: Defendant—perhaps with untreated mental health limitations—becomes frustrated with his attorney's failure to file motions on his behalf or to visit him in jail. The attorney-client relationship deteriorates. In a moment of desperation, amidst the stress of a court hearing, he physically assaults his counsel. He loses his right to counsel without warning from the trial court or a recorded evidentiary hearing.

Scenario 3: Defendant is convinced he would present his case better pro se than any attorney could. He is brought into court for a hearing, and the trial court explains the benefits of counsel, the pitfalls of proceeding without representation, and requires him to assure the court of his understanding of the attendant risks and to voluntarily relinquish his right to counsel. He then proceeds into trial pro se.

Before a defendant can be required to navigate the criminal process without counsel—either through delaying the process or through more extreme misconduct—do these doctrines and procedures ensure consistency with Supreme Court precedent and our fundamental respect for a defendant's right to counsel?

A. What Are the Justifications, After All?

1. Courtroom Control

As many courts have explained, it is universally accepted—axiomatic even—that defendants should not be able to assault their attorneys or indefinitely delay a trial, and neither can state nor federal budgets afford serial and indefinite appointment of defense counsel to the indigent.¹⁵⁴ Appellate courts in nearly every

¹⁵⁴ See, e.g., *Commonwealth v. Lucarelli*, 971 A.2d 1173, 1179-80 (Pa. 2009); William Glaberson, *Suit Over Legal Aid Advances in New York*, N.Y. TIMES, May 6, 2010, at A20, available at <http://www.nytimes.com/2010/05/07/nyregion/07court.html>;

state and circuit are sympathetic and supportive of trial courts' assertions of control when a defendant has attempted to hijack the timetable of his case¹⁵⁵ or meddle with a court's authority. Despite a range of opinions about the propriety of a doctrine of forfeiture or waiver by conduct, it is clear that defendants cannot be permitted to play a "cat and mouse" game with a trial court.¹⁵⁶

But in their "analysis" of the issue—in the early cases that first allowed these practices and in the later cases that have adopted them—courts have confused a universal acknowledgment of the problem with identifying the appropriate solution.

Consider, for example, the *Bultron* opinion, a fundamental one on the subject: "Intentional misconduct for the purpose of forcing counsel to withdraw so that the trial cannot proceed is plainly obstructive to the administration of justice. The record supports the legal conclusion that Bultron forfeited his right to counsel by his conduct."¹⁵⁷ That the defendant's behavior is unacceptable is clear. It should not necessarily follow that the *only* appropriate legal response—or even the primary one—is the loss of that defendant's right to representation. And yet many appellate courts in both the state and federal court systems accept the loss of the right to counsel as a mechanism by which courts may assert authority over an unruly defendant.¹⁵⁸ To the limited extent that forfeiture cases discuss the justification of the doctrine, courts describe the duty to uphold and maintain order in the court. The *Means* court emphasized the importance of ensuring that the defendant receives his due process, but the opinion also stressed that doctrine is used as a way of ensuring safety and control in the courtroom. Looking more broadly at forfeiture, the Supreme Court in *Allen* fell squarely on the side of

Adam Liptak, *Defendants Squeezed by Georgia's Tight Budget*, N.Y. TIMES, July 5, 2010, at A13, available at <http://www.nytimes.com/2010/07/06/us/06bar.html>.

¹⁵⁵ *United States v. Goldberg*, 67 F.3d 1092, 1098 (3d Cir. 1995) ("[A] court has discretion to deny a request for a continuance if made in bad faith, for purposes of delay or to subvert the judicial proceedings.").

¹⁵⁶ *State v. Slattery*, 571 A.2d 1314, 1318 (N.J. Super. Ct. App. Div. 1990).

¹⁵⁷ *Bultron v. State*, 897 A.2d 758, 766 (Del. 2006).

¹⁵⁸ *Commonwealth v. Means*, 907 N.E.2d 646, 659 (Mass. 2009) ("Forfeiture is a method of court room management in extraordinary circumstances"). "[F]orfeiture or waiver by conduct of that right is justified by the judge's powers to ensure safety and control throughout the proceedings." *Id.* at 658 n.18 (quoting *Faretta v. California*, 422 U.S. 806, 834-835 n. 46 (1975)).

court's ability to control "disruptive, contumacious, stubbornly defiant defendants."¹⁵⁹ The view from that opinion is more in line with the suppression of disorder rather than the protection of the defendant's procedural rights.¹⁶⁰

An additional problem is that this doctrine reaches back to a conduct-driven waiver of the right to a defendant's *presence* in a trial rather than to his right to counsel.¹⁶¹ The Second Circuit's *Gilchrist*¹⁶² opinion read the analogy into the Supreme Court's opinions in *Illinois v. Allen* and *Taylor v. United States*, neither of which mentions forfeiture (of counsel) by name.¹⁶³ The *Gilchrist* opinion read (or rather, extends) *Allen* to mean that the Supreme Court did not indicate whether a warning was required in every circumstance, leaving open the question of forfeiture of the right to presence (i.e., a defendant's giving up the right to presence even though the judge has not given the defendant a warning).¹⁶⁴

In doing so, *Gilchrist* seems to ignore the differences between the right to counsel and the right to presence at a trial; while both are significant rights for criminal defendants, each connects to an entirely different body of authority.¹⁶⁵ Furthermore, there are court opinions on the subject of a defendant's right to presence requiring that before a court may conduct a trial in the defendant's absence, it must ensure that the defendant had

¹⁵⁹ *Illinois v. Allen*, 397 U.S. 337, 343 (1970) ("It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges . . . must be given sufficient discretion to meet the circumstances of each case.").

¹⁶⁰ *Id.*

¹⁶¹ *See id.*

¹⁶² *Gilchrist v. O'Keefe*, 260 F.3d 87 (2d Cir. 2001).

¹⁶³ *See Taylor v. United States*, 414 U.S. 17 (1973); *Allen*, 397 U.S. 337.

¹⁶⁴ Incidentally, *Gilchrist* also appears to read *Taylor*—in which the Supreme Court effectively held that *Taylor's* voluntary absence was the equivalent of a waiver of his right to be present—to mean that the Supreme Court recognizes forfeiture of the right to be present.

¹⁶⁵ The criminal defendant's right to be present during his trial derives from the Confrontation Clause of the Sixth Amendment and is considered a constitutional right. Although a defendant does not have to be warned that he will lose the right to be present during trial by voluntarily absenting himself from trial (meaning that the right may be waived even in the absence of a warning), there has not been a finding that the right may be totally forfeited. *See United States v. Barnwell*, 477 F.3d 844 (6th Cir. 2007).

adequate notice of his right to be present, the nature of the proceedings, and the consequences of the defendant's failure to appear.¹⁶⁶ Unfortunately, many of the cases related to forfeiture or waiver, which do not demand on-record warnings or hearings, ignore this fact. Instead, many announce that the solution is the loss of the right to counsel and unceremoniously reiterate the same line of cases used to justify the doctrine from its inception.¹⁶⁷ The *Gilchrist* opinion has seemingly formed the basis of the doctrine of forfeiture with more than seventy-five cases citing to that opinion and relying on its authority.¹⁶⁸

2. Fundamental Rights

It seems evident that many of these courts should have undertaken a more thorough and searching analysis of this problem and proposed a solution in light of the Supreme Court's precedent in *Johnson*, *Faretta*, and the like. Those cases do not cease to control questions of the loss of fundamental rights simply because a defendant's conduct—rather than his verbal waiver—is at issue.

In addition to being generally useful in a criminal trial process, the right to counsel is a fundamental right.¹⁶⁹ Its denial through a court ruling—or through counsel's ineffectiveness¹⁷⁰—is a structural error of such significant proportions that the extreme solution of a new trial is the required corrective measure.¹⁷¹

¹⁶⁶ See, e.g., *United States v. Tortora*, 464 F.2d 1202 (2d Cir. 1972); *Barnett v. State*, 512 A.2d 1071 (Md. 1986); *People v. Smith*, 497 N.E.2d 685 (N.Y. 1986); *State v. Jackson*, 341 S.E.2d 375 (S.C. 1986).

¹⁶⁷ See *King v. Bobby*, 433 F.3d 483 (6th Cir. 2006); *United States v. Bauer*, 956 F.2d 693 (7th Cir. 1992); *Waterhouse v. State*, 596 So. 2d 1008 (Fla. 1992); *Jones v. State*, 536 S.E.2d 511 (Ga. 2000).

¹⁶⁸ Figure based on citing references to *Gilchrist v. O'Keefe*, 260 F.3d 87 (2d Cir. 2001), further narrowed to the terms "right to counsel."

¹⁶⁹ Cf. Erica J. Hashimoto, *Defending The Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423 (2007).

¹⁷⁰ See *Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (extending the right to counsel to those who receive a "suspended sentence that may 'end up in the actual deprivation of a person's liberty'"); *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (criminal defendant not only has the right to assistance of counsel, he has the right to effective assistance of counsel); *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (right to conflict-free counsel).

¹⁷¹ See Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 WAKE FOREST L. REV. 55, 60-61 (2003) ("The right to counsel is deemed

Under the circumstances—balancing the harm of the loss of counsel (no matter what label courts might have given it) against the “burden” of warnings and acknowledgements on the record—it is difficult to justify not requiring some sort of hearing. After all, a hearing as envisioned in *Johnson* and *Faretta* are more than a simple five-minute court session, wherein an official must recite constitutional rights and warnings. Rather, it is the court’s opportunity to inform and educate a defendant about his rights and to ascertain whether any waiver was made “understandingly.”¹⁷²

Considering, too, that delays, disruptions, and dismissals of attorneys are all ways to express concern about the validity of the process, it is worth introducing here that courts should have in place a mechanism through which to evaluate legitimate pre-trial (or at least pre-conviction) concerns about a counsel’s effectiveness. As one case expressed, “While a defendant may not be forced to proceed to trial with incompetent or unprepared counsel . . . a refusal without good cause to proceed with able appointed counsel is a ‘voluntary’ waiver.”¹⁷³ But if no hearing is required in so many jurisdictions before a defendant loses his right to counsel for inappropriately delaying, complaining about, or railing at the process, courts may not intervene—pre-trial, when intervention could make a difference¹⁷⁴—in the case of the “unprepared” attorney. What, then, can be done if a defendant has legitimate concerns about his counsel or the process? Surely there is a way to better protect a court’s power to control its courtroom docket and procedures while effectively (and more consistently) safeguarding the right to counsel (whether appointed or retained)? Most courts are practiced at moving a case along or reminding a defendant that, while he has the right to counsel’s appointment,

‘fundamental’ . . . In fact, the United States Supreme Court has opined that it is as essential as any right conferred on criminal defendants.”); *see also* *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972) (“The assistance of counsel is often a requisite to the very existence of a fair trial.”).

¹⁷² *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

¹⁷³ *Maynard v. Meachum*, 545 F.2d 273, 278 (1st Cir. 1976) (internal citations omitted).

¹⁷⁴ *See United States v. Cronin*, 466 U.S. 648, 656-57 (1984).

he is not entitled to the counsel of his choosing.¹⁷⁵ Allowing courts flexibility in how that warning is afforded, yet requiring that it is done when a defendant is at risk of entering a criminal process without an advocate, addresses each of these considerations.

There may be a number of reasons why across-the-board warnings about the consequences of dilatory, threatening, or difficult conduct might seem unwarranted. First, hearings are expensive: courts across the nation are busy enough already with dockets overflowing and security and facilities being underfunded or in disrepair. They are extra trouble. This may also be seen as an over-reaction to a relatively rare problem—coddling a defendant whose only goal is to rage against the machinery of the judicial process.

In comparison to the number of total criminal defendants processed by the courts each year, the most extreme stories recounted here represent a relatively uncommon problem. However, any national trend related to the loss of counsel without a valid waiver is troublesome enough to warrant a decisive solution. The United States Supreme Court has failed to offer one, and so too have legislative bodies.

Although the issue demands more than a cost-benefit analysis, what is the burden of a short hearing when the risk is the violation of a fundamental right? Conduct is not so different from words that courts are justified—without better guidance from the High Court—in generating an entirely new set of tests to examine the waiver of counsel.

A minimal time investment in a warning and acknowledgment of risk may save decades of expensive litigation down the road (as in the Georgia case described in the Introduction). Once problems present themselves—a delay, perhaps, or conflict with an attorney's advice—the judge could *sua sponte* call the parties for a brief hearing during which she hears reasons for the defendant's behavior (including, perhaps, legitimate concerns about counsel's performance), warns the defendant of the consequences of continuing the behavior, and

¹⁷⁵ *Maynard*, 545 F.2d at 278 ("The right to counsel of one's choice is not absolute. A court need not tolerate unwarranted delays, and may at some point require the defendant to go to trial even if he is not entirely satisfied with his attorney.").

accepts the defendant's knowing and intelligent consent to the warning about dilatory tactics or potential threats or violence. A brief hearing the length of a *Faretta* warning or a *Boykin* colloquy is a small burden—especially when compared with the potential loss of a fundamental constitutional right.¹⁷⁶

B. Are Not These Fundamentally “Contemptuous” Defendants?

In many ways, both doctrines of implicit waiver and forfeiture appear punitive—especially because in some cases defendants lose not only their rights to counsel but their rights to a preceding warning or hearing. Our legal system, however, has a mechanism for dealing with unacceptable courtroom behavior by lawyer or client: contempt. A thorough search for an intersection of these doctrines has proven fruitless, which raises questions about why forfeiture and implicit waiver doctrines stuck while contempt sanctions in these cases seem to have been unexplored (at least by appellate courts).

Traditionally, contempt proceedings have been the primary “stick” available to trial and appellate courts overseeing difficult parties or counsel.¹⁷⁷ Contempt actions are common, and though procedures vary greatly across jurisdictions, they are meant to afford judges the power necessary to address misconduct, delay, or other roadblocks to an efficient judicial process.¹⁷⁸ A trial judge, of course, “may impose civil or criminal sanctions on both witnesses and parties at trial” and have “broad discretion” to fashion “narrowly tailored” remedies appropriate to the circumstances.¹⁷⁹

¹⁷⁶ See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

¹⁷⁷ *Authority of the Trial Judge*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 597, 606 (2010).

¹⁷⁸ Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power—Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 477, 480-81 (1990) (“Probably no more than a few minutes go by in this country without an attorney being charged or threatened by a judge with contempt. In Los Angeles County alone, one public defender is held in contempt or threatened with contempt every week.”).

¹⁷⁹ *Id.* at 606-07; see also Eric Fleisig-Greene, *Why Contempt is Different: Agency Costs and “Petty Crime” in Summary Contempt Proceedings*, 112 YALE L.J. 1223, 1246 (2003) (“[C]ontempt power could be maintained . . . where the contemnor posed an immediate threat of endangering those present or disrupting the court’s functions.”).

This is particularly relevant in criminal cases, which generate the highest number of contempt actions.¹⁸⁰

Clients' physical assaults upon an attorney have been held to be contempt of court—even when occurring in a courthouse hallway.¹⁸¹ If "calculated to impede, embarrass or obstruct the [trial] court in the administration of justice," even violent behavior occurring outside the presence of the court can fall into this category of cases.¹⁸² If contempt can be used to assert control over litigants' behavior even out of court, then its extension to cover unrepresented defendants' behavior is not radical. If counsel may be sanctioned for missing deadlines or failure to respond to other direction from the court,¹⁸³ then an unrepresented defendant's delays can be adequately addressed by contempt powers as well.

The various doctrines all address the same behavior and support improved courtroom control, but one makes much more sense. Contempt actions still reprimand defendants for their actions, but the right to counsel remains intact.

Not only is contempt the more traditional way of dealing with misconduct that disrupts the judicial process, its application in the implicit waiver/forfeiture context may be more analytically consistent as well. Many courts impute to criminal defendants an understanding of the consequences of violence or continued disruptive conduct; however, this presupposes that defendants

¹⁸⁰ Raveson, *supra* note 178, at 480-81 ("Although no one seems to maintain statistics on the frequency of contempt citations, anecdotal data suggests that the threat and use of contempt against attorneys, particularly those representing criminal defendants, is at an all time high and increasing.").

¹⁸¹ See *People v. Clancy*, 239 Ill. App. 369 (Ill. App. Ct. 1926).

¹⁸² See *id.* at 373; *Assault on Attorney as Contempt*, 61 A.L.R.3d 500 (1975); cf. *State ex rel. Browning v. Jarrell*, 192 S.E.2d 493 (W. Va. 1972).

The trial court's adjudging the defendant to be in *contempt* for assaulting an attorney in the court clerk's office was held erroneous . . . because the evidence was insufficient to show beyond a reasonable doubt that the attorney was going to or coming from court for, or in respect to, a proceeding had, or to be had, in that court, as required by the statute under which the defendant had been convicted, since, said the court, the evidence did not show what business, if any, the attorney had with the court at the time that the assault occurred.

Assault on Attorney as Contempt, 61 A.L.R.3d 500 (1975) (emphasis added).

¹⁸³ See Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 373 (2000) ("Contempt is intended as a remedial mechanism as well as a punishment for an offense against the state"—through injunctions, fines, or terms of imprisonment.).

could reasonably expect punishment for their behavior that would extend beyond the typical sanctions of contempt.¹⁸⁴ That is, a defendant may understand that a punch may constitute a tort or crime, or potential exposure to contempt sanctions, but assuming that criminal defendants understand these doctrines which elude both scholars and courts is too great a logical assumption.

C. Recommended Procedures

Of course, the circumstances described in this Article present complicated decisions for the courts considering them—particularly for the trial courts actually facing a difficult defendant (as well as other parties, the substantive case before it, and all other litigants demanding time and attention). This does not, unfortunately, relieve courts of the responsibility to hold the line requiring a knowing, *intelligent*, and voluntary relinquishment of the right to counsel in criminal proceedings.

The most intellectually and doctrinally consistent response to these situations is to keep misconduct in the realm where they belong: contempt actions. Disruptive conduct—including in and out of court violence or threatened violence against an attorney—is frequently sanctioned by trial courts through contempt actions, which can be specially tailored to a defendant's circumstances, the severity of the misconduct, and the stage of the proceedings. Contempt proceedings, unlike the right to counsel, do not require extensive colloquies, warnings, or special procedures: if a defendant shows disrespect to the court's order and authority, he can immediately be subjected to an additional contempt charge. This solution to the real problems addressed in the doctrines of implicit waiver of counsel and forfeiture is both more appropriate and better-reasoned and gets to the heart of the underlying concerns: courtroom control.

If, however, courts choose not to abandon the doctrines of forfeiture or implicit waiver in favor of contempt proceedings, a rather familiar hearing procedure would help ensure that courts maintain control over their parties and their docket, while at the

¹⁸⁴ Criminal contempt is traditionally imposed as a punishment for disobedience of a legal commandment. It can result in lengthy imprisonment and substantial fines. *Id.*

same time ensuring that a defendant's counsel is not lost without necessary due process. That procedure is an on-record hearing, which includes a colloquy about the defendant, the risks of his continued behavior, the risks of continuing pro se, and a clear warning about the doctrine of forfeiture or implicit waiver (and the fact that continued misbehavior will lead to the loss of the right to counsel). In those circumstances, a defendant must be competent¹⁸⁵ and demonstrate an understanding of the warnings and the rights he stands to waive.

An additional but somewhat less desirable response may involve adding simple warnings to a standard preliminary or first appearance hearing colloquy. In those hearings, defendants are typically explained that they hold important constitutional rights, most of which are easily waived.¹⁸⁶ To add a few simple sentences explaining that dilatory behavior or violence toward counsel may result in the loss of the right to counsel would neither incur special expenses nor waste valuable time, but would still serve to educate defendants about their rights and the possibility for waiving them.¹⁸⁷

1. A Warning and Hearing Disruptive or Dilatory Behavior

Short of failing to recognize a doctrine of forfeiture or implicit waiver (as many jurisdictions have done), the only approach consistent with existing Supreme Court precedent on the right to counsel requires both warnings about the risks of proceeding pro se and the risks of continued disruptive behavior. Of course, many states that do allow for a waiver by conduct do follow this

¹⁸⁵ Competence may be more of an issue in these cases than has manifested in the appellate opinions. Of course, as with any constitutional right, a defendant must be competent to understand and comply with the warnings he receives from the court, and a competence inquiry may be both appropriate and pragmatic in the sorts of cases described here. See *Westbrook v. Arizona*, 384 U.S. 150 (1966).

¹⁸⁶ For example, in the *Miranda* warning itself, defendants are told of their right to remain silent and of the consequences of their failure to remain so. This oversimplifies the warnings somewhat, but the analogy is nonetheless apt; if a defendant is able to waive his counsel through conduct, a warning that this can occur through a method other than a verbal waiver could be appropriate.

¹⁸⁷ On the other hand, while it might theoretically prevent the behavior discussed in this Article, the power of suggestion is strong. For this reason, a hearing, once signs of difficulty manifest, is both most practical and what is required under *Faretta* and *Johnson*.

procedure. Colorado offers an excellent example of how to address this somewhat complicated situation while remaining true to constitutional authority.

The Colorado Supreme Court has articulated so elegantly what seems to be the best approach to the circumstance—and has resolved a tension while considering interests of both trial courts and defendants. The jurisdiction recognizes a waiver by conduct, but makes clear:

A defendant may waive assistance of counsel either expressly or impliedly through his or her conduct [however,] [b]ecause there exists a strong presumption against the waiver of a fundamental constitutional right, the trial court has the duty to make a careful inquiry about the defendant's right to counsel and his or her desires regarding legal representation.¹⁸⁸

Most jurisdictions have resisted, for some reason, mandating a particular colloquy. Perhaps if courts cannot agree about whether a hearing is required in the first place, then mandatory questions must be too much to ask. But, of course, *Faretta* and *Boykin*—fundamental cases on waiver—do outline questions for waiver colloquies that ensure at least a constitutional minimum.

As the Eighth Circuit eloquently writes, “the right to counsel is a shield, not a sword,” and “[a] defendant has no right to manipulate his right for the purpose of delaying and disrupting the trial,” or any other proceeding.¹⁸⁹ Still, if the right to counsel—and Supreme Court jurisprudence interpreting and explaining that right—is to be appropriately protected, a warning, on the record, should be required before any waiver of that right can be found. Eyes must still be “wide open.”¹⁹⁰

If an in-person hearing is too expensive, burdensome, or otherwise impractical, the Massachusetts courts have solved this

¹⁸⁸ *People v. Alengi*, 148 P.3d 154, 159 (Colo. 2006).

¹⁸⁹ *United States v. Stewart*, 20 F.3d 911, 917 (8th Cir. 1994) (internal quotations omitted) (a defendant attempting to delay the proceedings received warnings about his behavior and was found to have waived his right to counsel).

¹⁹⁰ *See id.*

problem by warning defendants via videoconference.¹⁹¹ With improved technology becoming less complicated and expensive, this may offer a solution, making compliance with *Faretta* somewhat simpler.

Many courts, as described *infra*, do hold a hearing at the first sign of delay or difficulty, though the outcomes of these proceedings are mixed. Many jurisdictions, however, stop short of offering a hearing or warning in the case of physical violence or a threat of violence against an attorney, and a skeptic might assume this is because of the sudden and unpredictable nature of these cases or the defendants described therein. This mistakes the issue. First, until there is Supreme Court precedent to the contrary, this sidesteps the existing law requiring a *knowing* and intelligent waiver of counsel. Second, many (if not most) of the cases that culminated in violence began with lower-level delay or disruption of the process and offered earlier opportunities for warning or intervention.¹⁹² There were opportunities, in these cases, for a court to offer warnings—both about the risks of the continued misconduct and the risks of continuing pro se—as described above. Finally, at least one jurisdiction has offered a very workable model for responding to a defendant who has attacked his lawyer and preventing waiver without warning. In its *Holmes* case, Tennessee offered a rational, practical solution in these circumstances; the solution suggested is both consistent with protection of the defendants' constitutional rights and a rational response to a heated, emotional situation.¹⁹³ Again, there may not be “magic

¹⁹¹ See *Commonwealth v. Means*, 907 N.E.2d 646, 651-52 (Mass. 2009) (finding forfeiture of the right to counsel but affording a videoconferencing hearing for a defendant).

¹⁹² See, e.g., *United States v. Thomas*, 357 F.3d 357 (3d Cir. 2004); *State v. Rasul*, 167 P.3d 1286 (Ariz. Ct. App. 2007); *King v. Superior Court*, 132 Cal. Rptr. 2d 585 (Cal. Ct. App. 2003); *State v. Montgomery*, 530 S.E.2d 66 (N.C. Ct. App. 2000).

¹⁹³ The Tennessee Supreme Court gives another recommended procedure for dealing with potential forfeiture in future cases. So long as the query on whether the defendant has been appropriately warned is a dispositive concern in this procedure, this is an excellent method for addressing such circumstances.

For the benefit of trial courts in future cases where a criminal defendant is alleged to have physically attacked his lawyer, we suggest that the following procedure be followed. Counsel should be allowed to withdraw if requested. Then, unless the attack occurred in full view of the court, the trial court should conduct promptly an evidentiary hearing, with the defendant present

words" or a set colloquy that must be followed in every case. However, to suggest that a defendant's violent conduct makes compliance with the constitution impossible ignores a trial court's range of optional responses and ability to craft a solution appropriate to a defendant's unique concerns (and methods of manifesting them).

2. A General Warning at First Appearance

Additionally (not *alternatively*), if a warning could be added to an already-existing court appearance—say, a first appearance hearing, when defendants typically receive information about the right to remain silent, their right to appointed counsel, and the like—the only additional expense involved is twenty extra seconds of the judge's breath.

If protection of defense attorneys from potential harm is a factor (in part) driving a policy allowing the forfeiture of the right to counsel, would not a warning at the beginning of the process do more to prevent this? Forfeiture is almost by definition a reactionary response—and if a defendant does not understand the consequences of his actions, then forfeiture or waiver is no deterrent. The addition of a brief warning that "egregious conduct" can form the basis of a waiver of counsel could help prevent the

and permitted to testify, and make findings of fact on the basis of the proof presented. The trial court should determine, on the basis of the facts found, whether the defendant engaged in "extremely serious misconduct" sufficient to justify the extraordinary sanction of an immediate forfeiture (or implicit waiver) of counsel. In making this determination, the trial court should consider (a) the stage of the proceedings; (b) whether the lawyer attacked is initial counsel or is a successor to other lawyers allowed to withdraw due to problems with the defendant; (c) whether the defendant had previously been warned about the potential loss of counsel as a result of misbehavior; (d) whether the defendant engaged in the misconduct deliberately and with the aim of disrupting, delaying, or otherwise manipulating the proceedings; (e) the degree of violence involved and the seriousness of any injury inflicted; and (f) whether measures short of forfeiture will be adequate to protect counsel. If the trial court concludes that the defendant did not commit "extremely serious misconduct" so as to justify a forfeiture, the trial court should (1) appoint new counsel (assuming prior counsel withdrew); (2) inform the defendant of the potential consequences of future misbehavior and the risks of proceeding pro se; and (3) order such measures as are necessary to protect new counsel from future misbehavior by the defendant.

problematic behavior in the first place. After all, courts must be careful not to make too many assumptions about a defendant's understanding. On the other hand, any warning must be clear enough to put a defendant on notice, while stopping short of suggesting violence in the first place or inhibiting a defendant from complaints about his attorney's performance (in a more appropriate form).

Practices differ among the state or federal jurisdictions, but in Georgia, all defendants receive information about their constitutional rights in a hearing to be held not later than seventy-two hours after an arrest.¹⁹⁴ At this first appearance, the judicial officer is required to inform the defendant about the charges against him and about his *Miranda* rights.¹⁹⁵ In addition to offering further information about bail (if applicable) and making cursory decisions about the existence of probable cause, defendants are given information about their right to counsel and the procedures through which counsel may be appointed.¹⁹⁶ This could be an appropriate opportunity to explain that, although accused of a crime and entitled to the assistance of counsel, the right to counsel can be "waived" or "forfeited" under circumstances of a defendant's delay or as a result of a defendant's threatening behavior. It would add no perceptible length to such a hearing and—coupled with a later warning if appropriate—could prevent unconstitutional, involuntary loss of the right to counsel (if not the offending behavior itself).

3. Standby Counsel is Not Constitutionally Sufficient

A number of courts—perhaps out of discomfort with a blanket loss of counsel after a defendant disrupts the trial process but yet unwilling to offer a full hearing under the circumstances—have adopted alternatives. Some "recommend" but do not require a hearing before a defendant can lose his right to counsel.¹⁹⁷ Others require an examination of the entire record (as a whole) to determine whether there is evidence that the defendant

¹⁹⁴ GA. UNIF. SUPER. CT. R. 26.1.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See *State v. Watson*, 900 A.2d 702, 714-15 (Me. 2006).

independently understood the rights he stood to lose.¹⁹⁸ A third approach, which is relatively common in the federal courts, even when a defendant has expressly waived his right to counsel, offers standby or “shadow” counsel to the defendant to assist him during his trial. Each of these is constitutionally insufficient—and may in fact cause more confusion in the long run.

The appointment of standby representation does not fully address the disconnect that exists between a defendant's right to be represented by an attorney at trial and a trial court's determination that the defendant has validly waived or forfeited his or her right to an attorney. Some authority proposes that defendants may be appointed standby counsel before acquiring a valid waiver, thus violating the defendant's right of self-representation if he or she does not expressly affirm that right.¹⁹⁹

The use of standby counsel—as opposed to actual representation—is improper if a defendant has not validly waived his right to counsel. While some authority suggests that standby counsel should be appointed in circumstances of uncertainty,²⁰⁰ it is possible that a defendant will not receive warnings regarding the dangers of self-representation because the court presumes that standby counsel eliminates the need for valid waivers. Further, appointing standby counsel may violate a pro se defendant's rights if appointment “yield[s] a presentation to the jury that directly contradicts the approach undertaken by the defendant.”²⁰¹ The defendant has a right to retain actual control over his or her case; this is the core of the *Faretta* right. Finally, because “multiple voices for the defense could confuse the message the defendant wishes to convey . . . a standby attorney's participation would be barred when it would destroy the jury's perception that the defendant is representing himself.”²⁰²

¹⁹⁸ See *Jones v. State*, 536 S.E.2d 511, 514 (Ga. 2000).

¹⁹⁹ *People v. Nieves*, 442 N.E.2d 228, 235 (Ill. 1982); *State v. Chavis*, 644 P.2d 1202, 1207 (Wash. Ct. App. 1982).

²⁰⁰ *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

²⁰¹ *United States v. Davis*, 285 F.3d 378, 381 (5th Cir. 2002), *cert. denied*, 537 U.S. 1066 (2002).

²⁰² *Indiana v. Edwards*, 554 U.S. 164, 186 (2008) (Scalia, J., dissenting) (internal quotation marks and citations omitted).

CONCLUDING THOUGHTS

Few, perhaps, are particularly outraged that a defendant (by definition, of course, standing trial for criminal activity) might lose his right to counsel for belligerent, contrarian, or perhaps even violent behavior. But to lose counsel without warnings on the record should at least prove uncomfortable to those who recognize the rationale in *Johnson*, *Gideon*, *Faretta*, and others in that company.

And if not outrage or discomfort, then, perhaps even the most skeptical can perceive an irony here. A defendant facing a criminal trial attempts to proceed without counsel—wishing to conduct his trial *pro se*. In that circumstance, under guidance and directive from the United States Supreme Court, a trial court is required to give the defendant particularized warnings, including describing the usefulness of a lawyer's skill and counsel, the traps of courtroom and evidentiary procedure, and the penalties should he be found guilty.

On the other hand, consider the person facing those same charges but who never vacillates in his understanding of the importance of counsel. He accepts appointed counsel (or retains his own counsel, assuming he is financially able to do so). At some point, dissatisfied with his counsel—perhaps his attorney has mapped an unacceptable strategy for the case, has failed to meet with or identify witnesses, or has otherwise failed to prepare a defense in a satisfactory way—that defendant requests new representation. If the trial court finds that the defendant's actions are "dilatory" or otherwise disruptive to the process, that defendant could find himself facing a trial or other court proceedings on his own and without an advocate.

If the understood punishment here in the case above is contempt for punching the attorney, then why would implicit waiver and forfeiture, two notions not common to uneducated defendants, be understood as punishment as well? Most competent defendants may expect some consequences after threatening or carrying out violence against their counsel, but those punishments take different forms: contempt proceedings, civil suit, and criminal charges. And since they are by definition on trial for "bad behavior" and entitled to (appointed) counsel, why

would any such defendant presume that bad behavior could likewise lead to the loss of counsel?

The truth is that very little related to protections or procedures for those charged with crimes changes because of widespread public outrage. What should attract attention, though—and action—is this inconsistency among jurisdictional approaches and inconsistency with clearly established federal law on the loss of counsel. If criminal defendants can lose their guaranteed right to counsel because of unpopular or impolite behavior—without a hearing, without a warning, without a “knowing, intelligent, and voluntary” assent that continuation of disruptive behavior could lead to the loss of representation—then *Gideon* means little and *Faretta* makes no sense.

FROM PROVING PRETEXT TO PROVING
DISCRIMINATION: THE REAL LESSON OF
MILLER-EL AND SNYDER

Joshua C. Polster*

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INTRODUCTION

Dyed-red hair,¹ too passive,² too vocal,³ too old,⁴ too young,⁵ employed as an engineer,⁶ employed as a Sunday school teacher;⁷ these are all recent explanations given to deny minorities a place on juries. When prosecutors presented these reasons, courts did not reject them as laughable, but accepted them as part of parties' legitimate discretion over who to seat on their juries.

Prosecutors offered these reasons as explanations for peremptory challenges, which parties exercise during jury selection to eliminate prospective jurors from a venire unilaterally. Federal and state courts provide peremptory challenges to all parties, in civil and criminal cases, so that attorneys can strike veniremembers who they believe will be unfavorable to their case.

¹ See *infra* note 229 and accompanying text.

² See *infra* note 215 and accompanying text.

³ See *infra* note 214 and accompanying text.

⁴ See *infra* note 212 and accompanying text.

⁵ See *infra* note 213 and accompanying text.

⁶ See *infra* note 227 and accompanying text.

⁷ See *infra* note 131 and accompanying text.

Historically, prosecutors used challenges to eliminate African American veniremembers, who they theorized were unfit for service and would be sympathetic to black defendants. The Supreme Court tried to put an end to this shameful practice in *Batson v. Kentucky*, holding that the Equal Protection Clause prohibits parties from challenging jurors on the basis of race, guiding lower courts in detecting discrimination, and dictating that appellate courts reverse convictions found by juries from which veniremembers had been struck discriminatorily.⁸ But as the explanations above may suggest,⁹ and as much scholarship has argued,¹⁰ peremptory challenges are still used by some prosecutors as vehicles for discrimination.

The Court has held that the Equal Protection Clause also prohibits discrimination based on gender and discrimination by defense attorneys and attorneys for civil litigants.¹¹ Accordingly, the arguments in this Article can also be applied to such situations. Because of the history of¹²—and likely still-occurring—prosecutorial discrimination, however, this Article will focus on prosecutors using peremptory challenges to eliminate African Americans. This focus corresponds to courtroom practices: The vast majority of *Batson* objections are made by criminal defendants to prosecutorial challenges of African American veniremembers.¹³

Much of the inability of courts to detect discrimination can be attributed to the inherent difficulty of distinguishing when a challenge is based on a prediction that a prospective juror will be

⁸ 476 U.S. 79, 88 (1986).

⁹ See *supra* notes 1-7 and accompanying text.

¹⁰ See *infra* Part I.D. for a discussion of studies that suggest that prosecutors continue to discriminate.

¹¹ See *infra* notes 40-42 and accompanying text.

¹² See *infra* notes 27-32 for a brief overview of peremptory challenges as tools of racial discrimination.

¹³ See Kenneth J. Melilli, *Batson in Practice: What We Have Learned about Batson and Peremptory Challenges*, 71 NOTRE DAME. L. REV. 447, 458 tbl.A-5 (“*Batson* Complainants”) (1996) (finding that more than eighty-eight percent of *Batson* challenges were raised by criminal defendants); *id.* at 462 tbl.E-1 (“Targeted Groups”) (finding that in more than eighty-seven percent of cases in which a party raised a *Batson* challenge, the objection was to the challenge of black veniremembers).

unfavorable and when a challenge is based on race.¹⁴ But this Article argues that the inability of courts to detect prosecutorial discrimination is also due to judicial application of the framework implemented by the Supreme Court for that purpose.

In *Batson*, the Court adopted the *McDonnell Douglas* framework, which it had previously applied in cases of employment discrimination. The three-part framework requires, on a finding of a prima facie case, that the alleged discriminator articulate a nondiscriminatory reason for its action. The alleged victim then has the burden of proving that the proffered reason is a pretext for discrimination. As traditionally applied, the framework therefore hinges on the ability of defendants to prove pretext.¹⁵

In two recent cases—*Miller-El v. Dretke*¹⁶ and *Snyder v. Louisiana*¹⁷—the Supreme Court used this framework to find that prosecutors had discriminated. Lower courts have interpreted these decisions as enumerating factors that they should consider in determining whether nondiscriminatory reasons are pretextual. This Article argues that this interpretation—and, more generally, this focus on pretext—is not suited to detecting discrimination in peremptory challenges.

To illustrate the problem, this Article compares courts' application of the framework in employment cases—for which the Supreme Court initially applied the framework—and *Batson* challenges. Employers generally present business-related reasons, substantiated by business records. Employees can prove that the reasons are pretextual by showing that the records are inaccurate, that the reasons do not plausibly explain employers' personnel decisions, or that the reasons apply to nonminority employees against whom the employers did not take similar actions.¹⁸

Prosecutors, however, explain their challenges with strategic reasons, which they base on veniremembers' background, demeanor, and statements during voir dire. Because the reasons

¹⁴ Lawyers may believe prospective jurors will be unfavorable *because* of their race or gender. A strike based on such a belief is discriminatory, although some studies have shown connections between race and juror sympathies. *See infra* note 71.

¹⁵ *See infra* Part I.B. for a more detailed discussion of the tripartite framework.

¹⁶ 545 U.S. 231, 266 (2005).

¹⁷ 552 U.S. 472, 476-77 (2008).

¹⁸ *See infra* note 172.

are often just assertions about veniremember characteristics, defendants generally cannot show that they are inaccurate; because prosecutors and courts can theorize numerous reasons why a veniremember might be sympathetic to a defendant, defendants generally cannot show a reason is implausible; because so many reasons are available to prosecutors, defendants often cannot compare between veniremembers about whom the prosecution has applied the same reason. Judicial focus on defendants' ability to prove that reasons are pretextual thereby effectively prevents most defendants from proving discrimination.

The Supreme Court's recent cases, *Miller-El* and *Snyder*, suggest that courts should no longer focus on pretext. The Court presaged such a shift in its post-*McDonnell Douglas* employment cases, which held that at the third step of the framework, courts must determine whether an employer has discriminated, not whether an employer's reason is pretextual. The Court has been less explicit in the peremptory challenge context, but in *Miller-El* and *Snyder*, rather than considering defendants' ability to show the falsity of individual proffered reasons to be dispositive, the Court evaluated all of the prosecutors' actions that suggested a discriminatory intent.

Part I of this Article provides an overview of peremptory challenges and the adoption of the *McDonnell Douglas* framework, discussing how the framework naturally gave rise to a focus on pretext. Part II argues that the focus on pretext effectively prevents defendants from proving intentional discrimination. In illustrating this argument, Part II uses two recent cases, one employment discrimination claim and one *Batson* challenge, as lenses through which to understand the broader case law. The cases show that judicial conceptions of prosecutors' jury-selection decisions—in contrast with judicial conceptions of employers' personnel decisions—render prosecutors' proffered nondiscriminatory reasons nearly impossible to disprove.

Part III proposes that *Miller-El* and *Snyder* prescribe that courts move away from a narrow focus on pretext. Instead of looking at each challenged veniremember and determining if the defendant has proven the prosecution's reasons for that challenge to be false, courts should frame their analyses around the prosecution's pattern of strikes, determining if this pattern, given

the totality of the prosecution's actions, is more likely explained by the proffered reasons or by discrimination.

I. "SMOKING OUT" DISCRIMINATION BY PROVING PRETEXT

This Part provides a brief background of peremptory challenges, explaining their historical use by prosecutors to exclude African Americans from jury service. In *Batson v. Kentucky*, the Supreme Court prohibited this practice. Borrowing from employment law, the Court instituted the *McDonnell Douglas* framework to help defendants detect and demonstrate prosecutorial discrimination. Scholars have concluded that the use of the *McDonnell Douglas* framework has not succeeded in ending discrimination. Two recent Supreme Court cases model a way to improve the framework, but lower courts, because of their focus on pretext, have yet to realize it.

A. An Overview of Peremptory Challenges

Peremptory challenges allow parties to strike prospective jurors from a venire without stating a reason. Parties can eliminate veniremembers who they believe will be partial, thereby, as asserted by the Supreme Court, increasing the accuracy of trials and parties' confidence in their results.¹⁹ While not required by the Constitution,²⁰ nearly every court in the United States allows peremptory challenges. In federal capital trials, parties are allowed twenty challenges while in other felony trials, the government is allocated six challenges and the defendant ten.²¹ In federal civil trials, both parties have three challenges.²² Every state also provides parties with challenges. While the number varies widely by state, parties in felony trials

¹⁹ See *Swain v. Alabama*, 380 U.S. 202, 219 (1965) ("The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them . . .").

²⁰ See *Stilson v. United States*, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases . . .").

²¹ FED. R. CRIM. P. 24(b)(1)-(2).

²² 28 U.S.C. § 1870 (2006).

often have between six and ten challenges and as many as twenty-five in capital cases.²³

The procedures for using peremptory challenges also vary by court, but there are two primary types. In the “struck jury” method, after the parties have made their challenges for cause,²⁴ a panel is seated with a number of prospective jurors equaling the number of jurors that will ultimately serve on the petit jury, plus the number of alternates needed, plus the total number of peremptory challenges allocated to the parties. The parties then use their challenges, either in alternating fashion or—blind to the other party’s selections—simultaneously. The remaining jurors constitute the final panel.²⁵

In the “jury box” method, a panel is seated with the number of prospective jurors that will ultimately serve on the petit jury. The parties, generally in alternating fashion, challenge prospective jurors for cause and peremptorily. Whenever a juror is struck, a new prospective juror is seated, so that the panel retains its original number. When the parties have used all of their allotted challenges, the remaining jurors constitute the petit jury.²⁶

Adopted from English common law,²⁷ peremptory challenges became tools of discrimination in the United States. Historically,

²³ See U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS: STATE COURT ORGANIZATION 2004, at 228-32 tbl.41 (“Trial Juries: The Allocation of Peremptory Challenges”) (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf> (charting peremptory challenges by state). Like the federal government, some states provide fewer challenges to the prosecution. *Id.* States also provide fewer challenges in civil cases; generally, around three per party. *Id.*

²⁴ The grounds for challenges for cause vary by state but are generally based on a showing that a prospective juror is actually biased or, because of a certain characteristic, is impliedly biased. See William P. Barnette, *Ma, Ma, Where’s My Pa? On Your Jury, Ha, Ha, Ha!: A Constitutional Analysis of Implied Bias Challenges for Cause*, 84 U. DET. MERCY L. REV. 451, 456-59 (2007) (providing an overview of actual and implied bias); see also N.Y. CRIM. PROC. LAW § 270.20(1) (McKinney 2002) (providing that prospective jurors may be challenged for cause based on reasons such as a state of mind that will preclude the veniremember from impartiality; a relationship to a party; and service on or appearance before the indicting grand).

²⁵ Kathleen M. McKenna, *Jury Trial Issues*, in CURRENT DEVELOPMENTS IN FEDERAL CIVIL PRACTICE 2010, at 581, 587-88 (Practicing Law Inst. 2010).

²⁶ *Id.* at 588.

²⁷ See Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 812-30 (1997), for a history of the peremptory challenge.

African Americans were completely excluded from juries.²⁸ When the Supreme Court held that the Fourteenth Amendment prohibits laws explicitly excluding African Americans from jury service,²⁹ states used other methods of exclusion, such as “intelligence” requirements and the “key man system,” which allowed designated local officials to handpick jury pools.³⁰ When the Court restricted these practices—at least in the criminal context—by holding that the Sixth Amendment dictates that juries must be drawn from a fair cross-section of the community,³¹ parties increasingly relied on peremptory challenges to exclude minorities.³²

The Supreme Court tried to limit this discrimination in *Swain v. Alabama*, holding that a state violates the Equal Protection Clause³³ when prosecutors deny jurors the right to serve on the basis of their race.³⁴ The Court held, however, that a prosecutor’s exercise of challenges in any given case could not constitute a constitutional violation.³⁵ A defendant could only claim a violation if “in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be,” a prosecutor used challenges to remove all African Americans from the venire.³⁶

In *Batson v. Kentucky*, the Court found that this requirement, especially as interpreted by lower courts, placed a “crippling burden of proof” on defendants,³⁷ making peremptory challenges “largely immune from constitutional scrutiny.”³⁸ The *Batson* Court accordingly held that a defendant could make an

²⁸ See *id.* at 828 n.96 (describing state laws that prevented African Americans from serving on juries).

²⁹ *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

³⁰ EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 9-10 (2010); see also Hoffman, *supra* note 27, at 828 (summarizing state methods of excluding African American jurors).

³¹ *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975).

³² EQUAL JUSTICE INITIATIVE, *supra* note 30, at 11-12; Hoffman, *supra* note 27, at 827-29.

³³ U.S. CONST. amend. XIV, § 1.

³⁴ 380 U.S. 202, 203-04 (1965).

³⁵ *Id.* at 221.

³⁶ *Id.* at 223-24.

³⁷ 476 U.S. 79, 92 (1986).

³⁸ *Id.* at 92-93.

Equal Protection claim based just on challenges exercised by the prosecution in the defendant's specific case.³⁹ *Batson* thereby prohibits prosecutors from using peremptory challenges to strike any juror because of the juror's race. Subsequent cases have extended the holding to discrimination based on gender⁴⁰ and by defendants⁴¹ and civil litigants.⁴²

But, as argued by Chief Justice Burger in dissent to *Batson*, and as reflected in the majority opinion in *Swain*, it is one thing to prohibit discrimination, but quite another to enforce the prohibition. Lawyers use peremptory challenges to eliminate prospective jurors who may be biased against their case,⁴³ but they cannot conclusively know *ex ante* whether a juror will be biased. Lawyers must therefore make hunches based on the limited information gathered during *voir dire*.⁴⁴ To allow for these hunches, peremptory challenges can be exercised "without a reason stated."⁴⁵ Accordingly, how is a court to separate legitimate challenges, which may be based on an "assumption" or "intuitive judgment," from those made because of race?⁴⁶

B. Supreme Court Adopts McDonnell Douglas Framework to Detect Discrimination

To solve the problem of proof, the *Batson* Court borrowed from employment law, where a similar problem exists. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of race, sex, religion, and national

³⁹ *Id.* at 96.

⁴⁰ *J.E.B. v. Alabama*, 511 U.S. 127, 130-31 (1994).

⁴¹ *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

⁴² *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 629 (1991).

⁴³ See *supra* note 19 (describing the purposes of peremptory challenges).

⁴⁴ *Swain v. Alabama*, 380 U.S. 202, 220 (1965) ("[T]he peremptory permits rejection for a real or imagined partiality It is often exercised upon the 'sudden impressions and unaccountable prejudices'" (quoting *Lewis v. United States*, 146 U.S. 370, 376 (1892))).

⁴⁵ *Swain*, 380 U.S. at 220.

⁴⁶ *Batson v. Kentucky*, 476 U.S. 79, 123 (1986) (Burger, C.J., dissenting) ("A clause that requires a minimum 'rationality' in government actions has no application to 'an arbitrary and capricious right' . . .") (quoting *Swain*, 380 U.S. at 219); see also *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005) ("The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature . . .").

origin.⁴⁷ But employers, under the common law doctrine of employment at will, have discretion in managing or terminating their employees.⁴⁸ Accordingly, while employment discrimination is governed by statute and peremptory challenges by the Equal Protection Clause, in both situations, factfinders⁴⁹ must determine if a party acted on the basis of legitimate discretion or discriminatory motives.

Now that courts and legislators have imposed consequences on employers and prosecutors for overt discrimination, there is unlikely to be direct evidence of discrimination. Employers generally do not produce memoranda stating that a manager did not hire an applicant because of race, and prosecutors will rarely explain to courts that they challenged a potential juror because of race. In *McDonnell Douglas Corp. v. Green*,⁵⁰ the Court applied a three-step framework to allow proof of discrimination through circumstantial evidence.⁵¹ In *Batson*, the Court adopted this framework for peremptory challenges: (1) the employee or defendant must make a prima facie case; (2) the employer or prosecutor must rebut it by giving a nondiscriminatory reason for the employment decision or challenge; and (3) the employee or defendant must prove that there was, contrary to the reason proffered, purposeful discrimination.⁵²

⁴⁷ 42 U.S.C. § 2000e-2(a) (2006).

⁴⁸ See, e.g., *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 273-74 (1975) ("The power to discipline or discharge employees has been recognized uniformly as one of the elemental prerogatives of management."); *Adair v. United States*, 208 U.S. 161, 175-76 (1908) ("In the absence, however, of a valid contract . . . it cannot be . . . that an employer is under any legal obligation, against his will, to retain an employee in his personal service . . .").

⁴⁹ The Civil Rights Act of 1964, Pub. L. No. 88-352, § 706, 78 Stat. 241, initially only provided for bench trials. The Civil Rights Act of 1991, Pub. L. No. 102-166, § 1977a(c)(1), 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981a(c)(1) (2006)), gave plaintiff employees the right to juries.

⁵⁰ 411 U.S. 792, 802-03 (1973). The three-step method had also been used to show discrimination in selection of jury venires. *Batson*, 476 U.S. at 94 (citing *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

⁵¹ *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" (brackets in original) (citations omitted)).

⁵² *Batson*, 476 U.S. at 96-98.

The *prima facie* case “eliminates the most common nondiscriminatory reasons” for an action.⁵³ For instance, in the employment hiring context, a plaintiff must show that he or she applied for a job, was qualified and rejected, and that after the rejection, the employer continued to solicit applicants. This evidence, along with the plaintiff’s membership in a protected class,⁵⁴ raises an inference that the employer rejected that plaintiff not for legitimate reasons, but because of discrimination.⁵⁵

Similarly, a defendant must show that a prospective juror of a given race or gender—the defendant need not be of the same race or gender⁵⁶—was qualified for service. This means only that a veniremember was not struck for cause, but was struck peremptorily.⁵⁷ The defendant must show that this fact, along with any other relevant facts, raises an inference of discrimination.⁵⁸

At the second step, to avoid a finding of discrimination, an employer or prosecutor must provide a nondiscriminatory explanation. Accordingly, instead of speculating about what an alleged discriminator’s motives might be,⁵⁹ an employee or defendant is armed with “clear and reasonably specific”⁶⁰ reasons and can “smok[e] out”⁶¹ discrimination by showing, at the third

⁵³ *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981).

⁵⁴ *McDonnell Douglas*, 411 U.S. at 802.

⁵⁵ See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (“A *prima facie* case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.”).

⁵⁶ *Powers v. Ohio*, 499 U.S. 400, 415-16 (1991).

⁵⁷ *Batson*, 476 U.S. at 96-97.

⁵⁸ *Id.*

⁵⁹ See *Johnson v. California*, 545 U.S. 162, 172 (2005) (“The *Batson* framework is designed to produce actual answers to suspicions and inferences The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question.”) (citations omitted).

⁶⁰ *Batson*, 476 U.S. at 98 n.20 (citing *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981)).

⁶¹ See Deborah C. Malamud, *The Last Minuet, Disparate Treatment after Hicks*, 93 MICH. L. REV. 2229, 2275 (1995) (“As originally envisioned, *McDonnell Douglas-Burdine* probably functioned as a primitive quasi-discovery device, aimed at ‘smoking out’ the employer’s evidence as to why it acted adversely to the plaintiff.”).

step, that the proffered reason was not the true reason for the employer or prosecutor's action.

C. Despite Batson, Discrimination Through Peremptory Challenges Persists

Despite the prohibition of intentional discrimination, prosecutors seemingly continue to target minority veniremembers with peremptory challenges. Studies of jury-selection patterns reveal shocking disparities in prosecutorial use of peremptory challenges against white and minority prospective jurors. In Jefferson Parish, Louisiana, between 1994 and 2002, prosecutors challenged more than fifty-five percent of African American veniremembers but less than seventeen percent of white veniremembers.⁶² Between 2005 and 2009, in Houston County, Alabama, which is twenty-seven percent African American, prosecutors used peremptory challenges to eliminate eighty percent of African American veniremembers so that the resulting juries were either all white or had only one African American member.⁶³ Exclusion of African Americans is not confined to the South. In Philadelphia, between 1981 and 1997, prosecutors in capital murder cases challenged fifty-one percent of African American veniremembers but only twenty-six percent of white veniremembers.⁶⁴

Part of these disparities is likely caused by unintentional or unconscious discrimination,⁶⁵ which, while undesirable, does not

⁶² RICHARD BOURKE, JOE HINGSTON & JOEL DEVINE, *BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE* 7 (2003).

⁶³ EQUAL JUSTICE INITIATIVE, *supra* note 30, at 14.

⁶⁴ David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 53 tbl.2 (2001). The statistics were reversed for defendants, who struck twenty-six percent of black veniremembers and fifty-four percent of white veniremembers. *Id.*

⁶⁵ Psychological research has shown that people's actions are influenced by unconscious stereotypes and biases. See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 973-75 (2006); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1199-1216 (1995). Professor Anthony Page explains how these mechanisms might lead prosecutors to perceive African Americans as hostile to their case and thereby as

violate the Equal Protection Clause as it is currently understood.⁶⁶ But part of the disparities is also likely due to intentional prosecutorial discrimination against African Americans. Some treatises instruct lawyers to consider race while selecting juries,⁶⁷ and some jury-selection consultants advertise their ability to select jurors of the ideal “demographic.”⁶⁸ More directly, in interviews, lawyers admit to considering the race of veniremembers.⁶⁹

Prosecutorial use of peremptory challenges may no longer depend on beliefs of racial inferiority.⁷⁰ Instead, it may stem from prosecutors’ pursuit of zealous advocacy: Some empirical studies suggest that African Americans are less likely to find defendants guilty.⁷¹ As long as this is true, or is widely believed to be true,⁷²

targets for peremptory challenges. See Anthony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 218-19 (2005) (explaining effects of unconscious biases on prosecutorial questioning); *id.* at 227-29 (explaining that prosecutors are more likely to attribute any negative observations of minority veniremembers to character flaws).

⁶⁶ See Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying that Race Still Matters*, 1994 WIS. L. REV. 511, 609 (1994) (“Batson’s lower court progeny would demonstrate conclusively that . . . proof of discriminatory purpose dominated the Court’s jury-related equal protection jurisprudence.”); Robin Charlow, *Tolerating Deception and Discrimination After Batson*, 50 STAN. L. REV. 9, 32-38 (1997) (analyzing the progression of Supreme Court peremptory challenge cases to conclude that “it appears to be subjective motivation that is determinative.”); Page, *supra* note 65, at 171-72 (finding that the Supreme Court requires subjective “discriminatory intent”).

⁶⁷ See, e.g., V. HALE STARR & MARK MCCORMICK, *JURY SELECTION* 193-200 (3d ed. 2001) (explaining how to weigh demographic variables, including race, to determine the best veniremembers for a case).

⁶⁸ In 2005, Justice Breyer cited jury-selection literature referencing race, *Miller-El v. Dretke*, 545 U.S. 231, 270-71 (2005) (Breyer, J., concurring), and consultants continue to suggest race plays a role. See, e.g., JURY RES. INST., *Juror Profiles*, <http://www.juryresearchinstitute.com/services/juror-profiles/> (last visited Dec. 18, 2011) (“Juror profiles developed by JRI professionals provide you with clear, concise summaries of the experiences, attitudes and demographic characteristics of jurors who are favorably or unfavorably predisposed toward your case.”).

⁶⁹ See Leonard Post, *A Loaded Box of Stereotypes: Despite ‘Batson,’ Race, Gender Play Big Roles in Jury Selection*, NAT’L L.J., Apr. 25, 2005, at 1 (discussing lawyers’ use of peremptory challenges).

⁷⁰ See *supra* notes 28-32 (summarizing the historical exclusion of black jurors).

⁷¹ See David C. Baldus et al., *The Use of Preemptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 15-22 (2001) (summarizing empirical studies of juror voting tendencies).

⁷² See, e.g., Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak about Voir Dire*, 51 WAYNE L. REV. 163, 303 (2005) (interviewing

prosecutors will likely continue to target African Americans with peremptory challenges. Needless to say, excluding potential African American jurors because of beliefs about their likely sympathies is no less an action of intentional discrimination than is excluding them because of beliefs about their mental capacities.

Along with this evidence that prosecutorial discrimination still exists, there is also strong evidence that defendants are often unable to demonstrate it using the *McDonnell Douglas* framework. While the success rate of parties raising *Batson* challenges varies widely by jurisdiction, Professor Kenneth Melilli found that in many states and federal circuits the rate is shockingly low. For example, in Georgia, parties prevailed less than 13% of the time; in Missouri, less than 9%; in the Fifth Circuit, 4%; and in Louisiana and the Eighth Circuit, less than 3%.⁷³ Professor Jeffrey Brand found similarly low success rates in his study of federal courts.⁷⁴ While both Brand and Melilli examined pre-1994 decisions,⁷⁵ a recent study suggests that success rates, at least at the appellate level, have not improved. Surveying federal decisions from 2000 through 2009, Professors Jeffrey Ballin and Junichi Semitsu found that federal courts reversed or remanded less than eleven percent of trial court denials of *Batson* challenges.⁷⁶

These numbers may even overstate the success rates of defendants bringing *Batson* challenges against the exclusion of African American veniremembers. Melilli found an overall success

attorneys and finding that “[p]erhaps the most common theme . . . is that African Americans were likely to favor criminal defendants and civil plaintiffs.”).

⁷³ Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 468 tbl.F-4 (1995-1996). Some states have substantially higher success rates: nearly 22% in Alabama, nearly 25% in Texas, and about 39% in New York. *Id.*

⁷⁴ Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 586 tbls.1 & 2 (1994) (finding that district courts found discrimination in twelve percent of cases, and circuit courts found discrimination or remanded in less than sixteen percent of cases in which a *Batson* challenge was made). Melilli coded the success rate of a *Batson* challenge based on its ultimate resolution, so trial court decisions were not counted if they were reversed on appeal. Melilli, *supra* note 73, at 456 n.67.

⁷⁵ Brand, *supra* note 74, at 584; Melilli, *supra* note 73, at 456.

⁷⁶ Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1092 (2011).

rate of less than eighteen percent, but found that criminal defendants were successful less than sixteen percent of the time.⁷⁷ Melilli also found that *Batson* challenges regarding African American veniremembers, by far the most common challenge made, were less successful than challenges regarding both genders and every other race, except for Hispanic and Native American veniremembers.⁷⁸

Based on these statistics, Melilli concluded that “*Batson* is almost surely a failure.”⁷⁹ Other scholars have similarly concluded that despite *Batson*, discrimination “continue[s] to flourish.”⁸⁰ This view has also been voiced on the Supreme Court: Justice Breyer has asserted that *Batson* has not achieved its goal of eradicating racial discrimination in jury selection.⁸¹

D. Miller-El and Snyder *Reinvigorate* Batson

A surefire way to end the use of peremptory challenges to discriminate would be to eliminate peremptory challenges. Justices Marshall and Breyer have advocated for elimination,⁸² and scholars frequently propose elimination as the best solution.⁸³ But Justices Marshall and Breyer’s opinions have not gained

⁷⁷ Melilli, *supra* note 13, at 459 tbl.B-1.

⁷⁸ *Id.* at 464 tbl.E-4.

⁷⁹ *Id.* at 503.

⁸⁰ David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 128 (2001).

⁸¹ *Miller-El v. Dretke*, 545 U.S. 231, 266-67 (2005) (Breyer, J., concurring).

⁸² *Miller-El*, 545 U.S. 231, 266-69 (2005) (Breyer, J., concurring); *Batson v. Kentucky*, 476 U.S. 79, 107-08 (1986) (Marshall, J., concurring).

⁸³ See, e.g., Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809 (1997); Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 502-03 (1995-1996); Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 245 (2005); Baldus et al., *supra* note 80, at 129. Instead of elimination, the use of peremptory challenges could be restricted. See, e.g., Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the “Blind” Peremptory*, 29 U. MICH. J.L. REFORM 981 (1996) (proposing that voir dire be exercised through questionnaires, so that parties could not see the veniremembers); Baldus et al., *supra* note 80, at 130 (proposing that courts limit the percentage of its peremptory challenges that a party could use against a given minority).

support within the Court,⁸⁴ and every state—and the federal rules—continues to provide parties with peremptory challenges.⁸⁵

In two recent decisions—*Miller-El v. Dretke*,⁸⁶ decided in 2005, and *Snyder v. Louisiana*,⁸⁷ decided in 2008—the Supreme Court has, however, for the first time, reversed trial courts to hold that the prosecution discriminated. In reaching these decisions, the Court followed the *McDonnell Douglas* framework that it adopted in *Batson*, evaluating whether the prosecution's step-two explanations were pretext for discrimination.⁸⁸ The Court's decisions were based on fact-intensive evaluations of the reasons given by the prosecution and the statements made by veniremembers. As such, the precedent of *Miller-El* and *Snyder* is unclear; the Court found pretext and discrimination because the facts, as interpreted by the Court, suggested pretext and discrimination. Whether peremptory challenges in future cases are discriminatory will depend on the precise reasons given by the prosecution and the specific statements and attributes of the veniremembers.

Scholars have argued that the fact-intensive nature of the analyses is the lesson lower courts should take from the Supreme Court. While defendants bear the burden of proving pretext, courts must not quickly accept prosecutors' nondiscriminatory reasons, but must probe the facts to make sure such reasons are supported.⁸⁹ Through its analysis in *Miller-El* and *Snyder*, the

⁸⁴ Justice Souter signed onto Justice Breyer's concurrence calling for the Court to "reconsider *Batson*'s test and the peremptory challenge system as a whole." *Rice v. Collins*, 546 U.S. 333, 344 (2006) (Breyer, J., concurring).

⁸⁵ See *supra* notes 21-23 and accompanying text (providing an overview of the number of peremptory challenges available to parties in state and federal courts).

⁸⁶ *Miller-El v. Dretke*, 545 U.S. 231 (2005).

⁸⁷ *Snyder v. Louisiana*, 552 U.S. 472 (2008).

⁸⁸ *Snyder*, 552 U.S. at 476-77; *Miller-El*, 545 U.S. at 239-40. The Court's analysis is more complicated because it is reviewing a lower court decision. Because *Miller-El* was an appeal for habeas corpus relief, the Court could only find for the defendant if it found that the state decision was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Miller-El*, 545 U.S. at 240 (quoting the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(2)). *Snyder* was not a habeas case, but even on direct appeal, the trial court's ruling was entitled to deferential review. *Snyder*, 552 U.S. at 477.

⁸⁹ See, e.g., John P. Bringewatt, Note, *Snyder v. Louisiana: Continuing the Historical Trend towards Increased Scrutiny of Peremptory Challenges*, 108 MICH. L. REV. 1283, 1301 (2010) ("*Snyder* took the type of 'meticulous facts and circumstances

Supreme Court demonstrated the types of facts courts should consider when evaluating these reasons.

The Court analyzed whether the prosecution used voir dire to question veniremembers about the issues that the prosecution later claimed were the grounds for challenge⁹⁰ and inquired whether these grounds seemed like plausible reasons to use a challenge.⁹¹ The Court analyzed whether these reasons, which supposedly lead the prosecution to challenge African American veniremembers, also applied to white veniremembers who the prosecution did not challenge.⁹² The Court considered the percentage of African American veniremembers who were challenged by the prosecution relative to the percentage of white veniremembers⁹³ and compared the questions that the prosecution asked to African American and white veniremembers.⁹⁴ The Court inquired whether there were historical practices of discrimination within the district attorney's office that was trying the case.⁹⁵

review' called for by [Miller-El] In doing so, the Court made it more difficult for pretextual explanations of peremptory challenges to slide by" (citation omitted); Heather Davenport, Note, *Blinking Reality: Race and Criminal Jury Selection in Light of Ovalle, Miller-El, and Johnson*, 58 BAYLOR L. REV. 949, 979 (2006) ("[T]he Court advanced—by way of example—the extremely detailed factual analysis that lower courts should undertake."); Jennifer Ross, Comment, *Snyder v. Louisiana: Demand for Judicial Scrutiny of the Use of Peremptory Challenges*, 4 DUKE J. CONST. L. PUB. POL'Y SIDEBAR 305, 305 (2009) ("Snyder demands a higher level of scrutiny from trial courts when they determine the presence of racially discriminatory intent and urges a more critical analysis of the race-neutral explanations proffered by lawyers using peremptory challenges.").

⁹⁰ *Miller-El*, 545 U.S. at 250 n.8 (noting that the prosecution did not question a black veniremember about a convicted brother despite this being the stated reason for the challenge); see also *Snyder*, 552 U.S. at 484 (finding that, in contrast with the African American veniremember who the prosecution challenged, the prosecution questioned a white veniremember who had substantial out-of-court obligations to obtain assurances that he could serve).

⁹¹ *Snyder*, 552 U.S. at 482 (finding that the prosecution's assertion that a veniremember who was a student-teacher would find the defendant guilty only of a lesser included offense so as to speed deliberations and return to the classroom was "highly speculative"); see also *Miller-El*, 545 U.S. at 252 ("[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives.").

⁹² See *Snyder*, 552 U.S. at 483-84; *Miller-El v. Dretke*, 545 U.S. 231, 241-52 (2005).

⁹³ *Miller-El*, 545 U.S. at 240-41.

⁹⁴ See, e.g., *id.* at 255, 261.

⁹⁵ *Id.* at 263-64. The Court made clear that evidence outside the specific case can be used to show pretext. See *id.* at 240 ("[A]lthough some false reasons are shown up

Many lower courts have responded to *Miller-El* and *Snyder* by using the above considerations in their analyses,⁹⁶ and even before the Supreme Court cases, many states had adopted similar lists of factors for courts to consider.⁹⁷ Factor tests are likely beneficial for detecting discrimination. Studies have found that when courts find that proffered reasons are pretextual, they often do so based on many of the factors described above.⁹⁸ Establishing and scrutinizing factors can also incentivize trial courts to make findings on the record for each factor, thereby aiding in appellate review.⁹⁹ Nonetheless, lower courts that read *Miller-El* and *Snyder* as merely confirming the appropriateness of factor tests miss a key aspect of the opinions and are unlikely to meaningfully increase their detection of discrimination.

E. Courts Focus on Proof of Pretext

Lower courts err by focusing their analyses on whether defendants have proven the prosecution's nondiscriminatory reasons to be pretextual. This focus on pretext is unsurprising; it is a natural result of the *McDonnell Douglas* framework. While

within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand.").

⁹⁶ See, e.g., *United States v. Nelson*, 450 F.3d 1201, 1207-08 (10th Cir. 2006) (summarizing the factors used in *Miller-El*); *Jones v. State*, 938 A.2d 626, 634 (Del. 2007) (same); *Watkins v. State*, 245 S.W.3d 444, 448-49 (Tex. Crim. App. 2008) (same).

⁹⁷ See, e.g., *Ex parte Branch*, 526 So. 2d 609, 624 (Ala. 1987); *Slappy v. State*, 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987); *State v. Parker*, 836 S.W.2d 930, 939-40 (Mo. 1992); *Manning v. State*, 765 So. 2d 516, 519 (Miss. 2000); *People v. Ritchie*, 217 A.D.2d 84, 89 (N.Y. App. Div. 1995); *Brumfield v. Exxon Corp.*, 63 S.W.3d 912, 917 (Tex. Ct. App. 2002).

⁹⁸ See, e.g., Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 478-83 (1996) (examining decisions in which courts rejected proffered reasons and finding that courts gave rationales such as disparate treatment or insufficient voir dire of challenged jurors or cited prosecution reasons that were unsupported by the record, unpersuasive, or based on stereotypes); William C. Slusser, David Hricik & Matthew P. Eastus, *Batson, J.E.B., and Purkett: A Step-by-Step-by-Step Guide to Making and Challenging Peremptory Challenges in Federal Court*, 37 S. TEX. L. REV. 127, 154-55 (1996) (finding that parties can show pretext using factors such as disparate treatment, disparate examination, insufficient voir dire of challenged jurors, reasons unrelated to case, or reasons based on stereotypes).

⁹⁹ Tracy M.Y. Choy, Note, *Branding Neutral Explanations Pretextual under Batson v. Kentucky: An Examination of the Role of the Trial Judge in Jury Selection*, 48 HASTINGS L.J. 577, 596 (1997).

the framework has three steps, the Court set low thresholds for the first two. When making a *prima facie* case, the Court held that a defendant does not need to persuade the court that discrimination likely occurred, but only needs to produce evidence that would permit the judge to draw such an inference.¹⁰⁰ Similarly, at the second step, the Court dictated that nondiscriminatory reasons do not have to be “persuasive, or even plausible”;¹⁰¹ so as long as they are not inherently discriminatory, they survive.¹⁰²

Because the first two steps can be so easily satisfied,¹⁰³ courts focus their analyses on the third step. In *Batson*, the Court articulated the third step as a determination of whether “the defendant has established purposeful discrimination.”¹⁰⁴ The employment cases from which the Court adopted the framework suggest that this determination depends on whether an alleged victim of discrimination has proven the proffered nondiscriminatory reason to be pretextual. In *McDonnell Douglas*, the Court remanded the case to allow the plaintiff-employee an “opportunity to show that [the employer’s] stated reason for [the employee’s] rejection was in fact pretext.”¹⁰⁵ Similarly, in *Texas Department of Community Affairs v. Burdine*, the Court articulated the third step of the analysis as requiring the plaintiff to prove “that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.”¹⁰⁶ In *Batson*, the Court cited *Burdine* for the proposition that a prosecutor must give “clear and reasonably

¹⁰⁰ *Johnson v. California*, 545 U.S. 162, 170 (2005).

¹⁰¹ *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

¹⁰² *Id.*

¹⁰³ Despite the low thresholds, judges do screen out some claims at the preliminary steps. See Melilli, *supra* note 98, at 460-61 (1996) (finding that judges rejected about thirty-eight percent of *prima facie* cases and about twenty-two percent of neutral explanations). There is significant variation between jurisdictions. See *id.* at 467 (showing *prima facie* success rate by state and federal circuit). Jeffrey Brand found that courts reject *prima facie* cases a majority of the time, although his study just examined federal courts, a relatively small sample size. Jeffrey S. Brand, *The Supreme Court, Equal Protection And Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 586 (1994).

¹⁰⁴ *Batson v. Kentucky*, 476 U.S. 79, 98 (1986).

¹⁰⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

¹⁰⁶ *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

specific" nondiscriminatory reasons,¹⁰⁷ which, in *Burdine*, the Court said are necessary to provide "a full and fair opportunity to demonstrate pretext."¹⁰⁸

Given these statements in *Batson* and in the employment cases from which *Batson* is drawn, when evaluating peremptory challenges, lower courts generally focus on proof of pretext. Many states courts that developed factor tests before *Miller-El* and *Snyder*—including Alabama,¹⁰⁹ Florida,¹¹⁰ Mississippi,¹¹¹ New York,¹¹² and Texas¹¹³—pronounced that the factors are to be used to determine whether a proffered reason is pretextual, and after *Miller-El* and *Snyder*, courts often continue to focus on pretext, a trend that is demonstrated—and criticized—in Part II.

II. PROBLEM WITH PROVING PRETEXT

To understand the problem with the judicial focus on proof of pretext, it is helpful to compare the application of the *McDonnell Douglas* framework in peremptory challenges with its application in employment discrimination cases. In both types of cases, courts focus on proof of pretext. But because of the differences between jury selection and employment, the methods that employees use for proving pretext are generally unavailing for defendants making *Batson* challenges. Section A introduces a recent employment case and peremptory challenge case, and Section B presents two differences between the judicial conceptions of jury selection and employee selection. Section C, drawing from the examples in Section A and the case law more generally,

¹⁰⁷ *Batson*, 476 U.S. at 98 n.20 (citing *Burdine*, 450 U.S. at 258).

¹⁰⁸ *Burdine*, 450 U.S. at 256.

¹⁰⁹ See *Ex parte Branch*, 526 So. 2d 609, 624 (Ala. 1987) ("[T]he following are illustrative of the types of evidence that can be used to show sham or pretext . . .").

¹¹⁰ See *Slappy v. State*, 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987) ("The following will weigh heavily against the legitimacy of any race-neutral explanation . . .").

¹¹¹ See *Manning v. State*, 765 So. 2d 516, 519 (Miss. 2000) ("This Court has identified five indicia of pretext when analyzing proffered race-neutral reason for peremptory strikes under *Batson* . . .").

¹¹² See *People v. Ritchie*, 217 A.D.2d 84, 89 (N.Y. App. Div. 1995) ("The determination as to whether a given explanation is or is not pretextual will also depend on a variety of factors . . .").

¹¹³ See *Brumfield v. Exxon Corp.*, 63 S.W.3d 912, 917 (Tex. Ct. App. 2002) ("Factors the trial court may consider in determining whether the explanation for a peremptory challenge is merely a pretext include . . .").

demonstrates that even when courts utilize the factors enumerated in *Miller-El* and *Snyder*, these differences often prevent defendants from proving pretext.

A. Proof of Pretext in Practice

This section introduces two discrimination cases recently decided by the Louisiana courts: *Mbarika v. Board of Supervisors*, an employment case decided in 2008,¹¹⁴ and *State v. Jacobs*, a peremptory challenge case decided in 2010.¹¹⁵ In both cases, the courts focused their analyses on whether the nondiscriminatory reasons proffered by the alleged discriminators—the employer and the prosecutor—were pretexts for discrimination.

1. Employment Discrimination: *Mbarika v. Board of Supervisors*

Upon conclusion of Professor Victor Mbarika's three-year term at Louisiana State University (LSU), the school did not offer him tenure. Dr. Mbarika sued, claiming that LSU had discriminated on the basis of his African American race.¹¹⁶ LSU countered that Dr. Mbarika was not offered tenure because of his performance.¹¹⁷ The trial court granted summary judgment for LSU, and the Louisiana Court of Appeals reviewed the decision, applying the *McDonnell Douglas* framework to determine if performance was the real reason for LSU's action or a pretext for racial motivations.

To determine the genuineness of LSU's proffered reason, the court examined evidence offered by LSU. At hiring, LSU provided Dr. Mbarika with its tenure policy, which dictated that offers would be based on research, evaluated by publication in leading academic journals.¹¹⁸ Over the course of his term, Dr. Mbarika received annual performance reviews, which noted that his

¹¹⁴ *Mbarika v. Bd. of Supervisors of La. State Univ.*, 992 So. 2d 551, 553-54 (La. Ct. App. 2008).

¹¹⁵ *State v. Jacobs*, 32 So. 3d 227 (La. 2010).

¹¹⁶ *Mbarika*, 992 So. 2d at 553-54.

¹¹⁷ *Id.* at 562. LSU also contended that Dr. Mbarika was not offered tenure because of his unsatisfactory teaching and lack of professionalism. *Id.* LSU did offer Dr. Mbarika a one-year contract, which was terminable at will. *Id.* at 554.

¹¹⁸ *Id.* at 554.

publications were in lower-tiered journals and advised him to target more prestigious journals.¹¹⁹

Dr. Mbarika argued that despite this evidence, the reason of performance was pretextual. He claimed that he had articles in the “revise and resubmit” stage at top journals, which were ignored during his performance reviews, and he argued that the quantity of articles that he published was greater than that of a white candidate who was offered tenure.¹²⁰

LSU countered these claims. A department chair’s deposition explained that articles in a “revise and resubmit” stage have not yet been accepted so are not given significant consideration. The chairperson further explained that LSU was primarily concerned with the quality, not quantity, of publications, and that the white candidate had published in top journals.¹²¹ Based on this evidence, the court concluded that Dr. Mbarika had not met his burden of showing that LSU’s neutral reason of performance was pretext for racial discrimination.¹²²

2. Peremptory Challenges: *State v. Jacobs*

An analogous use of the *McDonnell Douglas* framework is found in the Louisiana Supreme Court’s analysis of peremptory challenges in *State v. Jacobs*.¹²³ Like in *Mbarika*, the *Jacobs* court reviewed a trial court’s ruling that a party did not engage in racial discrimination and focused its inquiry on whether the reasons given by the alleged discriminator were pretextual.¹²⁴

The court first considered the challenge of veniremember Eric Hughes. The prosecution argued that it struck Mr. Hughes not

¹¹⁹ *Id.* at 555-57 (discussing Dr. Mbarika’s performance reviews).

¹²⁰ *Id.* at 558.

¹²¹ *Id.* at 558-60.

¹²² The appellate court affirmed the trial court’s summary judgment finding for LSU. *Id.* at 562-63. The Louisiana Supreme Court subsequently denied certiorari. *Mbarika v. Bd. of Supervisors of La. State Univ.*, 992 So. 2d 1019 (La. 2008).

¹²³ *State v. Jacobs*, 32 So. 3d 227 (La. 2010).

¹²⁴ In *Jacobs*, there was an intermediate appellate court ruling that the prosecution had engaged in racial discrimination. *State v. Jacobs*, 13 So. 3d 677 (La. Ct. App. 2009). After the supreme court ruling discussed in this subsection, the supreme court granted rehearing to clarify that it was remanding the case to the appellate court for issues raised by the defendant that were pretermitted by the appellate court’s earlier ruling. *State v. Jacobs*, 37 So. 3d 994 (La. 2010). On remand the appellate court upheld the conviction. *State v. Jacobs*, 67 So. 3d 535 (La Ct. App. 2011).

because he was Latino, but because he had a medical condition and asked to be excused; the prosecutor theorized that jurors who do not want to serve are likely to be hostile to the state.¹²⁵ The defendant argued that there was no evidence on the record of Mr. Hughes' medical condition,¹²⁶ but the court found that because of an out-of-court discussion that Mr. Hughes had with a bailiff, "[t]he condition was plausible."¹²⁷ The defense also tried to show that the reason was pretextual by pointing to a white veniremember who also disclosed a medical condition, but who the prosecution did not strike. The court, however, found the comparison inapposite. The white veniremember had diabetes, which the court explained can be managed with food and breaks so that a juror can comfortably serve; Mr. Hughes had a muscular condition, which the court surmised could prevent him from sitting for long durations.¹²⁸

The court also addressed the challenge of Leola Florence, an African American, in detail. The prosecution presented a variety of reasons for the challenge, including Ms. Florence's previous service on a hung jury.¹²⁹ The defendant countered that a white prospective juror had also served on a hung jury, but was not challenged. The court, however, noted that unlike the white juror, Ms. Florence indicated that the hung jury did not know what to do. Also, unlike the white juror, the prosecutor observed Ms. Florence sleeping during voir dire, and Ms. Florence had revealed that she was a possible victim in an unrelated case.¹³⁰

For three other peremptory challenges, the prosecution also proffered multiple reasons. Melanie Auzenne avoided eye contact, formerly worked in the district attorney's office, and spontaneously said she had never been accused of anything; Ivory Jordan wore shorts, worked at a casino, gave a disgusted look, and spoke with hesitation; Virginia Stevenson was asleep during voir dire, taught Sunday school, had relatives in jail, and had found for the plaintiff in a civil case. The court held that the defendant was

¹²⁵ *Jacobs*, 32 So. 3d at 230.

¹²⁶ *Jacobs*, 13 So. 3d at 690.

¹²⁷ *Jacobs*, 32 So. 3d at 229-30.

¹²⁸ *Id.*

¹²⁹ *Id.* at 231.

¹³⁰ *Id.*

not able to show that these reasons were pretextual and therefore had not proven discrimination.¹³¹

B. Differences Between Employment Decisions and Jury-Selection Decisions

While the courts in *Mbarika* and *Jacobs* both focused on proof of pretext, their analyses of pretext are different. This difference is caused by divergent judicial expectations about employment decisions and jury-selection choices. Employers make decisions for business reasons, whereas prosecutors make decisions for strategic reasons; and employers make decisions based on information, whereas prosecutors make decisions based on hunch.

1. Business Reasons vs. Strategic Reasons

Outside of discriminatory conduct, employers theoretically have unlimited discretion over whether to hire, promote, discipline, or fire employees.¹³² Accordingly, at the second step of the *McDonnell Douglas* framework, employers can offer any reason for their actions,¹³³ even those that seem like bad reasons for an employment decision,¹³⁴ such as personal animus or gut feelings.¹³⁵

Employers, however, know that they will face liability if, at the third step, employees can show that their proffered reasons are pretextual and are therefore motivated to offer reasons that courts will find persuasive. Unsurprisingly, given that employers

¹³¹ *Id.* at 234-35.

¹³² See *supra* note 48 and accompanying text (discussing employment at will). Beyond discrimination law, there are other constraints on employers' freedom to terminate. See, e.g., David J. Walsh & Joshua L. Schwartz, *State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales*, 33 AM. BUS. L.J. 645 (1996) (discussing the proliferation of state wrongful discharge doctrines).

¹³³ See *supra* notes 101-102 and accompanying text (discussing the low burden at the second step).

¹³⁴ See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 5 (1992) ("Any person may refuse to contract for no reason at all, or even for bad reasons that lie outside the reach of the discrimination principle.").

¹³⁵ The Court has even found that employers can articulate non-discriminatory reasons that violate other laws. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993) (finding that an employer does not violate ADEA by firing an employee in violation of ERISA).

are attempting to justify personnel decisions, the Supreme Court has suggested that the most persuasive reasons are those that relate to the business needs of the employer. “[I]n a business setting,” the Court has articulated, “more often than not people do not act . . . without any underlying reasons.”¹³⁶ The Court found that by enacting antidiscrimination legislation, Congress expected employers to “focus on the qualifications of the applicant or employee.”¹³⁷ As explained by Professor Richard Epstein, “[i]n some cases it might be possible [for an employer] to show that there was a bad [but nondiscriminatory] . . . reason [for its employment decision]. But in the typical case the best line of defense is to show that a refusal to hire or a decision to fire was made for a good cause, that is, for legitimate business reasons unrelated to race or sex.”¹³⁸

LSU, for instance, justified its rehiring decision based on Dr. Mbarika’s publication record,¹³⁹ and recent employment cases heard by the Supreme Court¹⁴⁰ reveal employer reasons of efficiency,¹⁴¹ corporate reorganization,¹⁴² matching positions with employee skills,¹⁴³ performance evaluations,¹⁴⁴ seniority,¹⁴⁵

¹³⁶ *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

¹³⁷ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 (1989).

¹³⁸ EPSTEIN, *supra* note 134, at 148; see also Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the “Pretext-Plus” Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 137 (1991) (“If the defendant generates an unseemly or arbitrary reason for its employment action that has no relation to any legitimate business objective, it should be easier . . . to prove that it is pretextual.”). Employers do not always give business-related reasons. Courts accept the reason of personal animosity, a trend critiqued in the employment literature. See generally Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary’s Honor Center v. Hicks, Pretext, and the “Personality Excuse,”* 18 BERKELEY J. EMP. & LAB. L. 183 (1997); Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177 (2003).

¹³⁹ See *Mbarika v. Bd. of Supervisors of La. State Univ.*, 992 So. 2d 551, 555 (La. Ct. App. 2008) (presenting LSU’s argument that Dr. Mbarika had not published in top-tier journals).

¹⁴⁰ This paragraph references all employment discrimination cases published by the Supreme Court since 2000, not just those that concern proof of discrimination under *McDonnell Douglas*.

¹⁴¹ Brief for Respondent at 3-4, *Gross v. FBL Fin. Grp., Inc.*, 129 S. Ct. 2343 (2009) (No. 08-441).

¹⁴² *Id.* at 5-6.

¹⁴³ *Id.* at 7-8.

¹⁴⁴ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 622 (2007).

insubordination,¹⁴⁶ employee qualifications,¹⁴⁷ and employee misconduct.¹⁴⁸ Treatises providing an overview of employers' nondiscriminatory reasons similarly conclude that employers proffer reasons generally related to employee performance or conduct or to economic conditions.¹⁴⁹

In peremptory challenges, prosecutors, just like employers, offer nondiscriminatory reasons that they hope courts will find persuasive. Rather than personnel decisions, prosecutors are attempting to justify strategic decisions. Therefore, while employers hope to persuade courts with reasons relating to their business, prosecutors hope to persuade courts with reasons relating to jurors' likelihood of voting for the prosecution or defense.

Unlike employment cases, however, where courts expect business-related reasons, courts do not have clear expectations for what sort of reasons are strategic. In *Batson*, the Supreme Court suggested that it would find a variety of categories of reason persuasive, asserting that whether a juror has "an open mind about the case" may depend on "age, education, employment, and economic status."¹⁵⁰ Initially the Court limited the reasons that prosecutors could assert within these categories to reasons "related to the particular case to be tried."¹⁵¹ In the cases following *Batson*, the Court has removed this limit, and suggested

¹⁴⁵ *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 58 (2006).

¹⁴⁶ *Id.*

¹⁴⁷ *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456-57 (2006).

¹⁴⁸ *Raytheon Co. v. Hernandez*, 540 U.S. 44, 46-47 (2003); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 144 (2000).

¹⁴⁹ C. GEOFFREY WEIRICH ET AL., 2002 CUMULATIVE SUPPLEMENT TO BARBARA T. LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 22-25 (3d ed. 1996) (categorizing employer reasons according to "misconduct, the need to eliminate jobs, other economic factors, poor work performance, personality factors, being overqualified for the job, attendance, inadequate or lesser qualifications, lesser work performance, or a combination of such factors").

¹⁵⁰ *Batson v. Kentucky*, 476 U.S. 79, 89 n.12 (1986) ("Prior to *voir dire* examination . . . lawyers wish to know as much as possible about prospective jurors, including their age, education, employment, and economic status, so that they can ensure selection of jurors who at least have an open mind about the case.").

¹⁵¹ *Id.* at 98.

that there are no limits, stating that any facially nondiscriminatory reason will suffice.¹⁵²

2. Information vs. Hunch

When making personnel decisions, employers generally have a wealth of information about the performance and compliance of employees and the financial situation of the company. When offering nondiscriminatory reasons, courts require employers to produce some of this information to justify their reasons. While in *McDonnell Douglas*, the Court stated that at the second step, employers must “articulate” a nondiscriminatory reason,¹⁵³ the Court has since clarified that employers have a burden of production,¹⁵⁴ which they must meet “through the introduction of admissible evidence.”¹⁵⁵ LSU, for instance, offered evidence through documentation of its tenure policy and Dr. Mbarika’s performance reviews and through depositions of the faculty who made the tenure decision.¹⁵⁶

The evidence offered by LSU was more than was necessary to meet a burden of production. LSU, like other employers, was incentivized to present additional evidence so as to persuade the court that its actions were not motivated by discrimination¹⁵⁷ and that it was therefore entitled to summary judgment.¹⁵⁸

¹⁵² See *supra* notes 101–102 (summarizing the low burden at the second step of the *McDonnell Douglas* framework).

¹⁵³ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹⁵⁴ *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981).

¹⁵⁵ *Id.*

¹⁵⁶ See *supra* Part II.A.1. (summarizing *Mbarika*).

¹⁵⁷ See *Burdine*, 450 U.S. at 258 (“[A]lthough the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful.”); see also Kenneth Bello, Jon W. Green & Bruce S. Harrison, *Summary Judgment*, in *EMPLOYMENT LITIGATION HANDBOOK* 111, 120 (Jon W. Green & John W. Robinson eds., 1998) (advising employers to introduce evidence in summary judgment motions to show courts that there is no genuine issue of fact concerning discriminatory intent).

¹⁵⁸ See FED. R. CIV. P. 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”); *id.* at 56(c)(1)(A) (listing the evidence a movant may cite to meet the burden for summary judgment); see also Malamud, *supra* note 61, at 2276 (finding courts increasingly use the *McDonnell Douglas* framework for summary judgment analysis).

In the peremptory challenge context, the *McDonnell Douglas* framework is used during voir dire and not during motion practice, so the prosecution does not formally offer evidence. Instead, prosecutors' burden at the second step has remained one of articulation: prosecutors need only "offer" a nondiscriminatory reason for their challenge.¹⁵⁹

Prosecutors generally have little evidence available to justify these reasons. Unlike cases about employee promotion or termination—hiring cases may bear a closer resemblance to peremptory challenges¹⁶⁰—where employees have track records of performance, substantiated by personnel files and witness testimony, prospective jurors have contact with attorneys only

¹⁵⁹ *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008).

¹⁶⁰ Employers often make hiring decisions based only on brief interviews or applications. Given this limited information and the subjectivity of the decisions, the employment literature has noted applicants' difficulty in proving pretext. See Michael Fix, George C. Galster & Raymond J. Struyk, *An Overview of Auditing for Discrimination*, in CLEAR AND CONVINCING EVIDENCE 1, 14 (Michael Fix & Raymond J. Struyk eds., 1993) ("Contact between the applicant and the employer during the hiring process is typically fleeting, the eventual outcome is unknown to the candidate, and the process itself rarely signals exclusionary intent."); Naomi Schoenbaum, *It's Time that You Know: The Shortcomings of Ignorance as Fairness in Employment Law and the Need for an "Information-Shifting" Model*, 30 HARV. J.L. & GENDER 99, 100 (2007) ("[B]ecause hiring decisions are often quite subjective, hiring discrimination claims can be some of the most difficult cases to prove."); see also John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991) ("Hiring charges outnumbered termination charges by 50 percent in 1966, but by 1985, the ratio had reversed by more than 6 to 1.").

during voir dire.¹⁶¹ Often attorneys cannot even speak with the veniremembers because the voir dire is conducted by the judge.¹⁶²

Any statements given by veniremembers are also likely brief¹⁶³ and may even be nonverbal. Often a juror may indicate a belief merely by raising (or not raising) a hand in response to a yes-or-no question posed to the entire panel.¹⁶⁴ Because of this paucity of information, prosecutors must predict juror voting tendencies based on limited characteristics, such as age, education, occupation, appearance, demeanor, marital status, and prior contact with the criminal justice system.¹⁶⁵

¹⁶¹ Previous literature has also noted that in contrast with employees, defendants have little evidence available to prove discrimination. See Lisa M. Cox, Note, *The "Tainted Decision-Making Approach": A Solution for the Mixed Messages Batson Gets from Employment Discrimination*, 56 CASE W. RES. L. REV. 769, 797 (2006) ("*Batson* claims can only be proven with transcripts of questions, the racial composition of the petit jury and the prosecutor's feeble excuses for striking a juror. Employment discrimination claims involve witness testimony, examination of the employer's prior employment decisions, the plaintiff's testimony, [and] the plaintiff's personnel file"); David A. Sutphen, Note, *True Lies: The Role of Pretext Evidence under Batson v. Kentucky in the Wake of St. Mary's Honor Center v. Hicks*, 94 MICH. L. REV. 488, 507 (1995) ("The issues raised in *Batson* hearings do not require the parties to conduct depositions and interrogatories, read lengthy evidentiary records or hear from a multitude of witnesses."); Malamud, *supra* note 61, at 2302-03 n.239 (distinguishing *Batson* challenges from employment suits with pleadings, discovery, and pretrial memoranda).

¹⁶² See Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 545 (1999) (concluding that the *Batson* doctrine developed at the same time as the trend of judges limiting lawyer questioning or conducting voir dire entirely by themselves); see also GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 79 (2007) (providing, based on state-by-state survey, a measure of the extent to which voir dire is controlled by the presiding judge).

¹⁶³ See Cavise, *supra* note 162, at 546 ("In the interest of time, most judges will ask as few questions as possible, and ask them in a "closed" manner that encourages a one-word response."). The length of voir dire varies considerably by state, but a recent survey indicates that for felony trials, the total time used for voir dire in most states is between one and two hours. See MIZE ET AL., *supra* note 162, at 77 (charting voir dire times by state).

¹⁶⁴ See MIZE ET AL., *supra* note 162, at 28 tbl.21 (finding the vast majority of judges and lawyers surveyed reported that some voir dire questions were posed to the full panel with veniremembers indicating responses through a show of hands).

¹⁶⁵ The jury selection literature theorizes about how these characteristics correspond to juror proclivities. See, e.g., Baldus et al., *supra* note 64, at 14-15 (listing commonly-held stereotypes about juror voting proclivities); Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and*

Prosecutors may not even have clear information on these limited characteristics because any observations they make are subject to multiple interpretations. For instance, in *Jacobs*, the prosecution claimed veniremember Auzenne avoided eye contact and used a peremptory challenge on her,¹⁶⁶ likely assuming that lack of eye contact meant hostility. But lack of eye contact could also signify deference or introversion, or could just be a product of happenstance.¹⁶⁷

Based on their brief responses during voir dire, prospective jurors that exhibit clear bias will be excused for cause.¹⁶⁸ Accordingly, prosecutors must determine which facially impartial veniremembers might cast an unfavorable vote.¹⁶⁹ Because of this paucity of information, peremptory challenges, as noted in Supreme Court opinions, are often made based on "hunch"¹⁷⁰ or "instinct."¹⁷¹

Scientific Jury Selection: What Works?, 17 OHIO N.U. L. REV. 229, 230-37 (1990) (summarizing recommendations in jury-selection guides).

¹⁶⁶ See *supra* note 131 and accompanying text.

¹⁶⁷ See generally Page, *supra* note 65, at 176 n.94 ("[T]he limited information will be processed subjectively. It is legitimate to strike a venire person who is actually hostile towards the striking attorney. It may be difficult, however, to judge what set of behaviors constitute hostility . . .").

¹⁶⁸ See *supra* note 24 (providing an overview of challenges for cause).

¹⁶⁹ The limited information available to prosecutors may also mean that they are more likely to discriminate; they will challenge veniremembers based on race or sex because they have little other information about which to base challenges. Scholars have used a similar rationale to argue that employers are more likely to discriminate in hiring decisions than in promotion or termination decisions. See David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1647 (1991) ("[S]tatistical discrimination [—discrimination based on a hypothesized correlation between minority status and employee performance—] is most likely to occur in hiring because information about employees is ordinarily much easier to acquire than information about applicants, and it is a lack of information that makes statistical discrimination rational."); Scott A. Moss & Daniel A. Malin, Note, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 HARV. C.R.-C.L. L. REV. 197, 202 (1998) ("Employers often can discern a worker's productivity only to a very limited extent before the worker begins the job But where an observable, immutable trait like race or disability correlates to a less observable negative trait, rational actors use the observable trait as a proxy for the negative trait.").

¹⁷⁰ *J.E.B. v. Alabama*, 511 U.S. 127, 148 (1994) ("[A] trial lawyer's judgments about a juror's sympathies are sometimes based on experienced hunches and educated guesses, derived from a juror's responses at voir dire or a juror's 'bare looks and gestures.'") (O'Connor, J., concurring) (quoting *Swain v. Alabama*, 380 U.S. 202, 220

C. Differences Prevent Defendants From Proving Pretext

Judicial conceptions of prosecutors' decisions as strategic choices based on hunches effectively prevent defendants from proving pretext in the ways that employees do. Employees attempt to demonstrate pretext by arguing that an employer's proffered nondiscriminatory reason does not accurately describe their characteristics or conduct, is not a plausible explanation for the adverse employment action, or has been applied differently to minority and nonminority employees.¹⁷² The Supreme Court used these factors, among others, to find that the prosecution had discriminated in *Miller-El* and *Snyder*.¹⁷³ An examination of *Jacobs*, and the peremptory challenge case law more generally, however, reveals that these methods are not well suited for defendants trying to show that prosecutors' reasons are pretextual.

1. Defendants Generally Cannot Prove Reasons are Inaccurate

Employees can argue that an employer's reason is pretextual by showing that the evidence proffered by the employer is

(1965)); *Batson v. Kentucky*, 476 U.S. 79, 123 (1986) ("[I]n making peremptory challenges, both the prosecutor and defense attorney necessarily act on only limited information or hunch.") (Burger, C.J., dissenting).

¹⁷¹ *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) (citing *Batson*, 476 U.S. at 106 (Marshall, J., concurring)).

¹⁷² See, e.g., *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 144-45 (2000) (finding that the employee made a substantial showing that the employer's explanation was false by presenting evidence contradicting the employer's claim that the employee had falsified company records); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) ("Especially relevant . . . would be evidence that white employees involved in acts against petitioner of comparable seriousness . . . were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races."); see Charles A. Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1159 (1991) ("Typically, though not exclusively, pretext is shown by proving that the supposed reasons . . . were not true when applied to [the plaintiff], or that such reasons existed for [employees of other groups who did not suffer similar adverse actions]."); Krieger, *supra* note 65, at 1180 (finding employees prove disparate treatment by presenting evidence that an employer's reason was not factually accurate or had been differentially applied); *infra* notes 188-95 for a discussion of plausibility analysis in employment cases.

¹⁷³ See *supra* notes 90-95 (discussing the factors used by the Supreme Court in *Miller-El* and *Snyder*).

inaccurate. Dr. Mbarika, for instance, in rebutting LSU's contention that his scholarship did not meet its standards, argued that the performance evaluations introduced by LSU did not recognize his articles in the publication process of top journals.¹⁷⁴ Dr. Mbarika also suggested that LSU had erred in its characterization of some of the journals in which he published.¹⁷⁵

Analogous arguments, however, are generally unavailable to defendants in peremptory challenges. When prosecutors challenge prospective jurors, the only information they often have is statements and observations of veniremembers during voir dire.¹⁷⁶ If prosecutors explain their challenges based on a veniremember's statements, the accuracy of these explanations is likely irrefutable.¹⁷⁷ As the court asserted in *Jacobs*, once the prosecutor challenged veniremember Jordan because of his employment at a casino, "[n]o amount of questioning would have elicited the response that Mr. Jordan did not work at a casino."¹⁷⁸

¹⁷⁴ See *supra* text accompanying note 121.

¹⁷⁵ See *Mbarika v. Bd. of Supervisors of La. State Univ.*, 992 So. 2d 551, 560 (La. Ct. App. 2008) (analyzing Dr. Mbarika's argument that LSU ranked journals so as to keep his publications from appearing in top tiers).

¹⁷⁶ See *supra* Part II.B.2. (describing the limited information available to prosecutors).

¹⁷⁷ In *Miller-El v. Dretke*, the defendant could refute the accuracy of the prosecution's reason because a prosecutor mischaracterized a statement that a veniremember made on the record. 545 U.S. 231, 242-44 (2005) (finding that the prosecutor asserted that a veniremember would only vote for the death penalty if rehabilitation was impossible even though the veniremember stated that he could impose the death penalty even if rehabilitation was possible).

¹⁷⁸ *State v. Jacobs*, 32 So. 3d 227, 235 (La. 2010). Employers can also assert reasons that cannot be proven inaccurate. See Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109, 178 (2007) ("McDonnell Douglas only works where the defendant's proffered reason is false (and thus susceptible to inferences of lying, cover-up, and discrimination). It will not work where the defendant's proffered reason is true—even where that reason did not in fact motivate the defendant."); see also *Riordan v. Kempiners*, 831 F.2d 690, 698 (7th Cir. 1987) ("[I]t is so easy to concoct a plausible reason for not hiring, or firing, or failing to promote, or denying a pay raise to, a worker who is not superlative."). In asserting cover-ups, however, employers are limited by the judicial emphasis on business related reasons, see *supra* Part II.B.1. and by their burden of production, see *supra* notes 154-56, which requires that they provide evidence for any proffered reason. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 513-14 (1993) (emphasizing that the employer, because it had terminated the manager who had terminated the plaintiff, would have to "confirm [its nondiscriminatory explanation] out of the mouth of its now antagonistic former employee"); Cox, *supra* note 161, at 793 ("[I]t is easier to present a subjective reason for a peremptory challenge . . . than it would be to include false reports in a personnel file and persuade

Defendants can theoretically refute the accuracy of reasons based on prosecutors' observations. Unlike employers, however, who must offer evidence to demonstrate their reasons—which employees can attempt to show is inaccurate—prosecutors need only state their reasons.¹⁷⁹ When prosecutors offer recollections to support challenges, defendants have no way to show that the recollections are false. For instance, when the prosecutor in *Jacobs* asserted that he struck veniremember Auzenne, in part, for lack of eye contact,¹⁸⁰ the defendant could not show that Ms. Auzenne *had* made eye contact: There is not likely to be objective evidence of jurors' demeanors.

Judges presiding over voir dire might be able to corroborate or contradict prosecutorial assertions about demeanor. But it seems unlikely that judges will have clear memories about such things as eye contact. Furthermore, because at the third step of the *McDonnell Douglas* analysis, the judge must determine the prosecutor's intent, the ultimate question is not the accuracy of a given explanation, but its genuineness, whether a prosecutor *believes* that a juror was struck for the proffered nondiscriminatory reason.¹⁸¹

Given judicial recognition that when making challenges, prosecutors act on speculation,¹⁸² defendants are unlikely to be able to refute prosecutors' beliefs in their recollections. In *Jacobs*, even though the judge did not recall that Mr. Jordan was wearing shorts¹⁸³ and did not interpret Mr. Jordan's speech pattern as an impediment,¹⁸⁴ the defense could not disprove that the prosecutor believed he had observed these things. Other courts have upheld

other employees to perjure themselves to make an employment decision appear legitimate.”).

¹⁷⁹ See *supra* Part III.B.2.

¹⁸⁰ See *supra* note 131 and accompanying text.

¹⁸¹ See *Purkett v. Elem*, 514 U.S. 765, 769 (1995) (overturning an appellate finding of discrimination because the court of appeals focused on the “reasonableness,” rather than the “genuineness” of the proffered reason).

¹⁸² See *supra* notes 170-71 and accompanying text.

¹⁸³ *State v. Jacobs*, 13 So. 3d 677, 694 (La. Ct. App. 2009), *rev'd*, 32 So. 3d 227, 235 (La. 2010).

¹⁸⁴ See Brief for Defendant at 16, *State v. Jacobs*, 13 So. 3d 677 (2009) (No. 07-KA-887) (quoting the judge who in denying the *Batson* challenge remarked that he thought Mr. Jordan's hesitation indicated shyness, but that it could have been caused by a speech impediment).

strikes based on prosecutors' conjectures: crediting, for example, prosecutors' assertions about veniremembers' language difficulty based on country of origin or accent;¹⁸⁵ speculation about familial relationships based on last name;¹⁸⁶ and recollections about jurors' statements, despite no on-the-record support.¹⁸⁷

2. Defendants Generally Cannot Prove Reasons are Implausible

Employees can also prove pretext by showing that employers' proffered reasons are implausible.¹⁸⁸ Employees argue that a reason, while business-related, does not justify the adverse action. Courts do not use their own business judgment to second guess the sensibility of employers' decisions,¹⁸⁹ but the Supreme Court

¹⁸⁵ See *United States v. McKoy*, 129 Fed. App'x 815, 821-22 (4th Cir. 2005) (upholding a challenge in part because of a conjecture that a veniremember with a Jamaican accent could have difficulty understanding witnesses with Spanish accents); *United States v. Canoy*, 38 F.3d 893, 898 (7th Cir. 1994) (upholding a challenge based on the prosecutor's inference that because a veniremember was educated outside of the U.S., he would have difficulty understanding English even though the veniremember did not demonstrate any such difficulty during voir dire); *People v. Jurado*, 131 P.3d 400, 423 (Cal. 2006) (finding that a difficulty understanding English can be inferred from a veniremember's birth in the Philippines). Failure to question a veniremember about English-language ability has also, however, been found to be evidence of pretext. See *Diomampo v. State*, 185 P.3d 1031, 1038 (Nev. 2008); see also *United States v. Changeo*, 1 F.3d 837, 840 (9th Cir. 1993) ("So long as the prosecutor . . . can convince the district court that the potential juror who is being struck *in fact* has difficulty with English, the justification is race-neutral."). Courts have also found English language deficiency to be a pretextual reason when voir dire reveals a veniremember's ability to speak and understand the language. See, e.g., *State v. Sherman*, No. C1-94-1247, 1995 WL 118917, at *2 (Minn. Ct. App. Mar. 21, 1995); *Diomampo*, 185 P.3d at 1037-38.

¹⁸⁶ *Jackson v. State*, 5 So. 3d 1144, 1150 (Miss. Ct. App. 2008) (King, C.J., specially concurring) (criticizing the prosecution for striking a prospective juror based on sharing a last name with someone who had been arrested without asking the juror if he was related to such person).

¹⁸⁷ *Scott v. State*, No. 04-06-00028-CR, 2007 WL 1059039, at *2 (Tex. Ct. App. Apr. 11, 2007) (finding that although the record did not contain a given statement, the prosecution's notes indicated that the given veniremember had spoken and that a challenge based on a good-faith, but mistaken belief, is not discriminatory).

¹⁸⁸ See, e.g., *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994) ("[T]he non-moving plaintiff [to survive summary judgment] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence' . . .") (citation omitted).

¹⁸⁹ See, e.g., *Hartley v. Wis. Bell, Inc.*, 124 F.3d 887, 890 (7th Cir. 1997) ("Plaintiffs lose if the company honestly believed in the nondiscriminatory reasons it offered, even

has noted that “[i]dentifiable qualifications for a single job provide a common standard by which to assess each employee.”¹⁹⁰ Accordingly, when an employee brings a discrimination claim, courts can analyze employers’ job descriptions and personnel criteria to see if they are consistent with the action taken against the plaintiff employee.

Dr. Mbarika, for instance, suggested that lack of top-tier publications could not explain LSU’s failure to grant him tenure, given the quantity of articles that he published.¹⁹¹ Dr. Mbarika’s argument was unsuccessful because LSU’s tenure criteria showed the plausibility of its reason; at hiring, Dr. Mbarika was provided with the tenure policy, dictating that decisions would be made, in part, based on publication in leading journals.¹⁹² When employers’ internal criteria do not explain their decisions, employees can prove pretext, showing, for instance, that an employer did not follow its hiring policies,¹⁹³ could not justify its employee ratings,¹⁹⁴ or terminated an employee for a mistake that, at the time, a company executive had characterized as “a minor matter.”¹⁹⁵

In the peremptory challenge context, defendants also try to prove the implausibility of the prosecution’s proffered reasons. The Supreme Court has found that “implausible or fantastic” explanations for challenges will likely be found to be pretexts,¹⁹⁶

if the reasons are foolish or trivial or even baseless.”); *Fuentes*, 32 F.3d at 765 (“[T]he factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.”).

¹⁹⁰ *McCleskey v. Kemp*, 481 U.S. 279, 295 n.14 (1987).

¹⁹¹ See *supra* note 120 (summarizing Mbarika’s arguments that he had published more articles than had a white candidate who was reappointed).

¹⁹² See *supra* note 118.

¹⁹³ *Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712, 727 (7th Cir. 2005) (reversing summary judgment by finding that an employee could show pretext, in part, by demonstrating that the hiring chairperson, contrary to employer policy, did not take into account the screening committee’s recommendations).

¹⁹⁴ *Tomasso v. Boeing Co.*, 445 F.3d 702, 709-10 (3d Cir. 2006) (reversing summary judgment, in part, by finding that the employer had not explained the reason for some of the employee’s low ratings).

¹⁹⁵ *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 56 (1st Cir. 2000) (reversing summary judgment, in part, because a factfinder could conclude that the employer’s reason was implausible given a comment by the vice president at the time the employee supposedly made the error).

¹⁹⁶ *Purkett v. Elem*, 514 U.S. 765, 768 (1995); see also *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (“Credibility [of a prosecutor] can be measured by . . . how reasonable,

and in *Snyder*, the Court questioned the plausibility of the prosecution's conjecture that a student-teacher would find the defendant guilty of a lesser-included offense so as to speed deliberations and return to the classroom.¹⁹⁷ But whereas, in employment cases, courts can examine employer policies and practices to determine plausibility, courts, as noted by Justice Marshall, do not have clear standards by which to assess prosecutor explanations.¹⁹⁸ District attorneys' offices do not share jury-picking standards with courts, and courts, recognizing that prosecutors must make guesses based on limited information,¹⁹⁹ do not impose standards on prosecutors' strategies.

Courts do not require that prosecutors demonstrate that the characteristics that they offer as nondiscriminatory reasons actually relate to a veniremember's voting proclivity. The Supreme Court, in *Miller-El*, found that the prosecution's failure to question a veniremember about a proffered reason casts doubt on the reason,²⁰⁰ but, as this was just one factor among many in the Court's decision,²⁰¹ lowers courts do not generally find that failure to question demonstrates that a reason is pretextual. In *Jacobs*, the prosecutor asserted that he struck veniremember Jordan in part for working at a casino, arguing that law-abiding citizens should not take part in some activities that occur at casinos.²⁰² But the prosecutor did not question Mr. Jordan about his morals²⁰³ and presented no evidence showing that casino workers are less likely to be law abiding or more likely to side with defendants. In striking veniremember Stevenson, the

or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.").

¹⁹⁷ See *supra* note 91.

¹⁹⁸ See *Wilkerson v. Texas*, 493 U.S. 924, 927 (1989) (denying certiorari) (Marshall, J., dissenting) ("[A] factfinder can assess the employer's faithfulness to its own nonracial criteria by examining whether the particular white candidate's qualifications, as defined by the criteria, were superior to those of the Afro-American candidate. In the *Batson* context, though, the criteria underlying a prosecutor's peremptory challenges are private . . .").

¹⁹⁹ See *supra* Part II.B.2.

²⁰⁰ See *supra* note 90 and accompanying text.

²⁰¹ See *supra* notes 90-95 and accompanying text (discussing factors considered by the Court in *Miller-El* and *Snyder*).

²⁰² *State v. Jacobs*, 32 So. 3d 227, 234 (La. 2010).

²⁰³ *State v. Jacobs*, 13 So. 3d 677, 694 (La. Ct. App. 2009), *rev'd*, 32 So. 3d 227 (La. 2010).

prosecutor never questioned her to see if her Sunday school teaching or relatives in jail revealed an anti-state bias²⁰⁴ and never presented any evidence that people with these characteristics have such biases. Similarly, when giving reasons, such as age,²⁰⁵ vocation,²⁰⁶ or dress,²⁰⁷ prosecutors generally do not need to present evidence that the given juror is biased or that jurors with those characteristics generally have biases.

Courts also do not require prosecutors to show that their reasons are related to the case being tried.²⁰⁸ The prosecutor in *Jacobs* implied that Mr. Jordan's employment in a casino could be connected to unsavory activities—perhaps gambling or organized crime. But the trial involved a sixteen-year old alleged to have shot a man and the man's mother;²⁰⁹ it is unclear how Mr. Jordan's employment suggested an affinity for such a defendant.

²⁰⁴ Brief for Defendant, *supra* note 184, at 17.

²⁰⁵ See, e.g., *People v. Lomax*, 234 P.3d 377, 413 (Cal. 2010) (finding it was not unreasonable for the prosecution to believe that a young person would impose a more lenient sentence); *State v. Martin*, 683 N.W.2d 399, 403-05 (S.D. 2004) (upholding the trial court's determination that a strike of a veniremember, in part, for being seventy-one years old was not "without a logical perception on the part of the state").

²⁰⁶ See, e.g., *State v. Martinez*, No. 1 CA-CR 08-0144, 2009 WL 3165489, at *2-3 (Ariz. Ct. App. Oct. 1, 2009) (upholding the challenge of an engineer based on the prosecutor's supposition, for which he offered no support, that "engineers are of a special breed"); *People v. Reynoso*, 74 P.3d 852, 865-66 (Cal. 2003) (upholding a challenge even though the record did not show the customer service representative's hypothesized lack of education and the prosecutor did not show that the representative was likely to favor the defense); *Jackson v. State*, 5 So. 3d 1144, 1148-49 (Miss. Ct. App. 2008) (finding that the prosecutor was not required to explain why a parochial school teacher would favor defendant).

²⁰⁷ In *Jacobs*, the prosecutor did not question veniremember Jordan about his shorts or explain why his shorts would impact his decision making. *Jacobs*, 13 So. 3d at 694. Similarly, in *Jackson v. State*, the court upheld the prosecution's strike of a veniremember with dyed-red hair because this, in the judge's opinion, could indicate the veniremember was "out of synch with society or something" even though the veniremember was an engineer, Brief of the Appellant at 16, *Jackson v. State*, 5 So. 3d 1144 (Miss. Ct. App. 2008) (No. 2007-KA-01782-COA), and the prosecutor presented no evidence of such a connection. *Jackson*, 5 So. 3d at 1149.

²⁰⁸ Some courts consider whether there is a relationship between the reason and the case, although they do not require that the prosecution actually demonstrate a relationship. See, e.g., *Ex Parte Branch*, 526 So. 2d 609, 624 (Ala. 1987); *Slappy v. State*, 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987); *Manning v. State*, 765 So. 2d 516, 519 (Miss. 2000); *State v. Parker*, 836 S.W.2d 930, 940 (Mo. 1992); *People v. Richie*, 217 A.D.2d 84, 89 (N.Y. App. Div. 1995); *Brumfield v. Exxon Corp.*, 63 S.W.3d 912, 917 (Tex. Ct. App. 2002).

²⁰⁹ *Jacobs*, 13 So. 3d at 682.

It is also unclear how veniremembers Stevenson's prior service on a jury that found for a plaintiff²¹⁰ would have any connection to the facts of *Jacobs*. Similarly, in cases where prosecutors strike jurors based on insufficient education, they are not required to show that the facts presented at trial will be complex.²¹¹

Courts also do not limit where within a given category jurors' characteristics must fall. In employment cases, by contrast, courts expect employers to take action only if employees exhibit a behavior in a certain direction. For instance, no matter what type of job an employee has or what type of business an employer engages in, if performance is offered as an explanation, an employee must have performed *poorly*. Ruling on *Batson* challenges, however, courts have accepted that prospective jurors were struck for being too old²¹² or too young;²¹³ too vocal²¹⁴ or too passive;²¹⁵ too educated²¹⁶ or too uneducated;²¹⁷ for being single²¹⁸

²¹⁰ See *supra* note 131 and accompanying text.

²¹¹ See, e.g., *Jackson*, 5 So. 3d at 1145-47 (upholding the peremptory challenge of a veniremember with a twelfth-grade education, in a trial for a restaurant hold-up, based on the prosecutor's reason of selecting a highly educated jury).

²¹² See, e.g., *People v. Jurado*, 131 P.3d 400, 423 (Cal. 2006); *State v. Myers*, 603 N.W.2d 378, 386 (Neb. 1999); *State v. Martin*, 683 N.W.2d 399, 403-05 (S.D. 2004).

²¹³ See, e.g., *People v. Lomax*, 234 P.3d 377, 413 (Cal. 2010); *Walker v. State*, 640 S.E.2d 274, 277 (Ga. 2007); *Myers*, 603 N.W.2d at 386.

²¹⁴ See, e.g., *United States v. Jynes*, 197 F. App'x 351, 353-55 (5th Cir. 2006); *State v. Givens*, 888 So. 2d 329, 340 (La. Ct. App. 2004); *Carroll v. State*, No. 10-08-00413, 2010 WL 5142386, at *7-9 (Tex. Ct. App. Dec. 15, 2010).

²¹⁵ See, e.g., *Stokes v. State*, 194 S.W.3d 762, 764-65 (Ark. 2004); *People v. Ledesma*, 140 P.3d 657, 687-88 (Cal. 2006); *Morales v. State*, No. 54180, 2010 WL 3503519, at *1 (Nev. July 15, 2010).

²¹⁶ See, e.g., *People v. Gaston*, 628 N.E.2d 699, 701 (Ill. App. Ct. 1993); *State v. Williams*, 922 S.W.2d 845, 850 (Mo. Ct. App. 1996); see also *People v. Reynoso*, 74 P.3d 852, 925 n.6 (Ca. 2003) ("[A]n attorney could peremptorily excuse a potential juror because he or she feels the potential juror's occupation reflects *too much education . . .*").

²¹⁷ See, e.g., *Taylor v. State*, 620 S.E.2d 363, 366 (Ga. 2005); *People v. Hecker*, 942 N.E.2d 248, 272-74 (N.Y. 2010); *State v. Mulligan*, 736 N.W.2d 808, 820-21 (S.D. 2007).

²¹⁸ See, e.g., *People v. Hamilton*, 200 P.3d 898, 933 (Cal. 2009); *Roberts v. State*, 651 S.E.2d 689, 693-94 (Ga. 2007); *Pitchford v. State*, 45 So. 3d 216, 226 (Miss. 2010).

or because of a marital relationship;²¹⁹ and for having been accused of a crime²²⁰ or having been a victim of a crime.²²¹

Prosecutors also strike prospective jurors for having no job²²² or for the jobs at which they are employed. In *Jacobs*, the prosecution struck veniremembers, in part, for working in a casino and having worked in the district attorney's office.²²³ Other courts have upheld challenges based in part on employment as a teacher,²²⁴ postal worker,²²⁵ customer service representative,²²⁶ and engineer.²²⁷ Similarly, courts uphold challenges based on all sorts of appearances. The court in *Jacobs* upheld the prosecutor's challenge of veniremember Jordan in part for his shorts;²²⁸ other courts have upheld challenges based in part on dyed-red hair,²²⁹ earrings,²³⁰ a large hat and sunglasses,²³¹ a T-shirt,²³² and an unbuttoned flannel shirt.²³³ The legal literature is full of many more examples of the varied reasons accepted by courts.²³⁴

²¹⁹ Courts allow peremptory challenges based on the occupation of a spouse. *See, e.g.*, *People v. Allen*, No. A118253, 2008 WL 2673363, at *7 n.8 (Cal. Ct. App. July 9, 2008); *People v. Davis*, 677 N.E.2d 1340, 1345 (Ill. App. Ct. 1997); *State v. Terry*, 928 S.W.2d 879, 884-85 (Mo. Ct. App. 1996).

²²⁰ *See, e.g.*, *People v. Cowan*, 236 P.3d 1074, 1114 (Cal. 2010); *Sykes v. State*, 953 A.2d 261, 270-71 (Del. 2008); *Munoz v. State*, No. 49227, 2008 WL 6062132, at *3-4 (Nev. Aug. 14, 2008).

²²¹ *See, e.g.*, *State v. Holloway*, 977 A.2d 750, 758-59 (Conn. App. Ct. 2009); *State v. Jacobs*, 32 So. 3d 227, 231-32 (La. 2010); *Horne v. State*, 825 So. 2d 627, 636 (Miss. 2002).

²²² *See, e.g.*, *Woolfolk v. State*, 644 S.E.2d 828, 832 (Ga. 2007); *State v. Johnson*, 207 S.W.3d 24, 36-37 (Mo. 2006); *Commonwealth v. Cook*, 952 A.2d 594, 609-10 (Pa. 2008).

²²³ *See supra* note 131 and accompanying text.

²²⁴ *Jackson v. State*, 5 So. 3d 1144, 1148-49 (Miss. Ct. App. 2008).

²²⁵ *Carter v. Duncan*, No. C 02-0586SBA(PR), 2005 WL 2373572, at *10-13 (N.D. Cal. Sept. 27, 2005).

²²⁶ *People v. Reynoso*, 74 P.3d 852, 923-26 (Cal. 2003).

²²⁷ *State v. Martinez*, No. 1 CA-CR 08-0144, 2009 WL 3165489, at *2-3 (Ariz. Ct. App. Oct. 1, 2009).

²²⁸ *See supra* note 131 and accompanying text.

²²⁹ *Jackson*, 5 So. 3d at 1149-50.

²³⁰ *United States v. Claytor*, No. 7:05 CR 0007, 2005 WL 1745642, at *3 (W.D. Va. July 26, 2005).

²³¹ *State v. Tyler*, No. M2005-00500-CCA-R3-CD, 2006 WL 264631, at *8 (Tenn. Crim. App. Feb. 1, 2006).

²³² *Cook v. LaMarque*, 593 F.3d 810, 819-20 (9th Cir. 2010).

²³³ *People v. Cruz*, 187 P.3d 970, 988-91 (Cal. 2008).

²³⁴ *See, e.g.*, Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1090-99 (2011); Jeffrey S. Brand, *The Supreme Court, Equal*

Defendants may argue that a reason is implausible because, if anything, it seems to suggest that a veniremember would be sympathetic to the prosecution.²³⁵ But unlike employment cases, where certain characteristics, such as high performance, are clearly ideal for employers, there is no standard for what makes a juror ideal. In *Jacobs*, the prosecutor argued, and the court did not dispute that, rather than making them desirable, Ms. Auzenne's past employment with the district attorney's office and Ms. Florence's status as a victim in another case, prejudiced them against the prosecution.²³⁶

Even if a court recognizes that some characteristics suggest that a veniremember would favor the state, the prosecution can still base a challenge on other characteristics.²³⁷ For example, besides pointing to Ms. Auzenne's former employment, the *Jacobs* prosecution asserted two other reasons for her challenge. Finding that the defendant did not prove that these reasons were pretextual, the court upheld the challenge.²³⁸ Other courts similarly uphold challenges of seemingly ideal minority veniremembers by finding that prosecutors articulated nondiscriminatory reasons that the defense did not disprove.²³⁹

Protection and Jury Selection: Denying that Race Still Matters, 1994 WIS. L. REV. 511, 591-94 (1994); Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 533-35 (1999); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations under Batson v. Kentucky*, 27 U. MICH. J.L. REFORM 229, 237-66 (1993).

²³⁵ The Supreme Court has indicated that the fact that a struck juror would seem ideal for the prosecution suggests discrimination. *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005).

²³⁶ See *supra* notes 130-31 and accompanying text. The prosecution offered a similar counterintuitive argument in *State v. Pona*, 926 A.2d 592, 600 (R.I. 2007), arguing that a veniremember with brothers in the police department was likely to side with the defense in order to contradict the assumption that she would be pro-state. The court upheld the challenge. See *infra* note 239 (noting that the challenge was upheld based on a different reason given by the prosecution).

²³⁷ Prosecutors would be wise to assert all the reasons for their challenges together. In *Miller-El*, after the defense contested one reason, the prosecution asserted an additional reason. The Court found this "reek[ed] of afterthought." 545 U.S. at 246.

²³⁸ *State v. Jacobs*, 32 So. 3d 227, 234 (La. 2010).

²³⁹ See, e.g., *People v. Washington*, No. A109989, 2006 WL 3720341, at *9 & n.7 (Cal. Ct. App. Dec. 19, 2006) (finding that a veniremember who was studying criminal justice and considering becoming a police officer was not ideal for the prosecution because although the veniremember had past positive experiences with the police, the veniremember also had past negative experiences with the police); *State v. Hoffman*,

As asserted by Justice Marshall, “[a]ny prosecutor can easily assert facially neutral reasons for striking a juror.”²⁴⁰ Since many of these facially neutral reasons are assertions about veniremembers’ statements or appearances, defendants are not often able to show that they are inaccurate,²⁴¹ and because courts have broad conceptions of acceptable jury-picking strategies, defendants generally are not able to show that the reasons are implausible.

3. Defendants Generally Cannot Prove Reasons also Apply to Unchallenged Jurors

The multitude of reasons available to prosecutors also can prevent defendants from proving pretext by showing that a given reason has been differentially applied. While the Supreme Court, in *Miller-El* and *Snyder*, compared minority veniremembers who the prosecution challenged with white veniremembers who the prosecution accepted in order to show discrimination,²⁴² the prosecution can avoid these comparisons by offering reasons that are unlikely to apply to other veniremembers. Highlighting this difficulty, in upholding the prosecution’s challenge of Mr. Jordan based on his employment at a casino, the *Jacobs* court emphasized that there were no jurors with similar jobs.²⁴³

Prosecutors also can prevent defendants from finding a comparable white veniremember by explaining challenges with multiple nondiscriminatory reasons. Courts have generally held that “where a party gives multiple reasons for striking a juror, it is not enough for the other side to assert that the empanelled juror

768 So. 2d 542, 557-59 (La. 2000) (finding that a veniremember with relatives in law enforcement and who had previously served on a jury that returned a guilty verdict was not ideal for the prosecution given the prosecution’s interpretation of the veniremember’s answers during voir dire); *State v. Pona*, 926 A.2d 592, 608-09 (R.I. 2007) (upholding a strike of a veniremember with police officer brothers based on the prosecution’s observation of the veniremember’s demeanor); *Scott v. State*, No. 1059039 2007 WL 1059039, at *2 (Tex. Ct. App. Apr. 11, 2007) (rejecting the defendant’s contention that a veniremember employed by the state was ideal for the prosecution because of a statement the prosecution alleged the veniremember to have made but which was not confirmed in the record).

²⁴⁰ *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

²⁴¹ See *supra* Part II.C.1.

²⁴² See *supra* note 90 and accompanying text.

²⁴³ *Jacobs*, 32 So. 3d at 235.

shares one attribute with the struck juror.”²⁴⁴ In *Miller-El*, however, the Supreme Court made clear that even if unchallenged white veniremembers do not have the precise mix of characteristics as the challenged minority veniremembers, comparisons can still undercut the legitimacy of proffered reasons.²⁴⁵

Nonetheless, while one reason that a prosecutor proffered for striking a minority veniremember may also apply to a white veniremember, this similarity is often insufficient to persuade courts that another reason proffered for the strike of the minority veniremember is pretextual.²⁴⁶ As one judge asserted after *Miller-El*:

While evidence that “a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-

²⁴⁴ *Wilson v. Cockrell*, 70 Fed. App’x 219, 224 (5th Cir. 2003) (citing *Alverio v. Sam’s Warehouse Club, Inc.*, 253 F.3d 933, 941 (7th Cir. 2001)); *see, e.g., United States v. Davenport*, No. 93-1216, 1994 WL 523653, at *6 (5th Cir. 1994) (finding a comparison of prospective jurors unpersuasive because the defendant did not show that any other juror “had the same combination of factors” that the prosecution had used to justify the strike); *Taylor v. State*, 620 S.E.2d 363, 366 (Ga. 2005) (“If multiple racially-neutral reasons are given for the peremptory strike of [African American] potential jurors, a *Batson* violation does not exist simply because one or more of those racially-neutral reasons was not used by the prosecutor to strike white potential jurors.” (citations omitted) (brackets in original)); *Berry v. State*, 802 So. 2d 1033, 1040 (Miss. 2001) (“[T]he fact that other jurors may have some of the individual characteristics of the challenged juror does not demonstrate that the reasons assigned are pretextual.”); *Cantu v. State*, 842 S.W.2d 667, 689 (Tex. Crim. App. 1992) (“Where . . . the State has offered numerous race neutral reasons for its challenge, we cannot say that the fact that there were other acceptable jurors possessing one or more of these objectionable attributes, is sufficient to establish disparate treatment.”). Employers can also proffer multiple reasons for their decision, but are generally limited to presenting business-related reasons, whereas prosecutors can assert almost any reason. *See supra* Part II.B.1.

²⁴⁵ *See Miller-El v. Dretke*, 545 U.S. 231, 247 n.6 (2005) (“None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one.”).

²⁴⁶ *See, e.g., People v. Huggins*, 131 P.3d 995 (Cal. 2006) (finding that while many of the prosecution’s explanations for challenging minority veniremembers could also apply to white veniremembers who were not challenged, the prosecutor presented additional evidence that the minority veniremembers would not support the death penalty); *Densey v. State*, 191 S.W.3d 296, 322-25 (Tex. Ct. App. 2006) (finding that although the challenged minority veniremember’s answers to questions concerning rehabilitation were the same as the answers of unchallenged white veniremembers, the prosecution had other reasons for challenging the minorities).

similar nonblack who is permitted to serve" tends to prove purposeful discrimination, the prosecution can rebut that evidence by showing that the prosecutor had other non-discriminatory reasons for striking the juror which did not also apply to the empaneled juror.²⁴⁷

In *Jacobs*, the prosecution struck Ms. Florence in part for having served on a hung jury, but did not strike a white veniremember who had also served on a hung jury. In upholding the challenge, the court found that the comparison did not show the reason to be pretextual because unlike the white veniremember, Ms. Florence had been the victim of a crime and was observed sleeping during voir dire.²⁴⁸ Similarly, prosecutors can strike an engineer while seating other jurors with technical backgrounds²⁴⁹ and strike a veniremember on the basis of inadequate education while striking other veniremembers with advanced educations.²⁵⁰

In addition to the multitude of reasons available to prosecutors, the ability of defendants to prove pretext by comparing veniremembers is limited by judicial perception of the flexibility of prosecutors' strategies. The Supreme Court has noted that while employers may look at many variables in assessing employees, "these variables are to a great extent uniform for all employees because they must all have a reasonable relationship to the employee's qualifications to perform the particular job at issue."²⁵¹

In contrast, prosecutors' preferences may change over the course of voir dire. The Supreme Court has noted that prosecutors may be more willing to use peremptory challenges earlier in voir

²⁴⁷ *Rose v. Spitzer*, No 99-CV-6053 (SLT), 2006 WL 1720445, at *9 (E.D.N.Y. June 22, 2006) (citing *Miller-El*, 545 U.S. at 241).

²⁴⁸ See *supra* note 130 and accompanying text.

²⁴⁹ *State v. Martinez*, No. 1 CA-CR 08-014, 2009 WL 3165489, at *2-3 (Ariz. Ct. App. Oct. 1, 2009).

²⁵⁰ *Jackson v. State*, 5 So. 3d 1144, 1150 (Miss. Ct. App. 2008) (King, C.J., concurring) ("Among the reasons for striking four of the black prospective were that . . . the prosecution wanted a well-educated jury. While desiring a well-educated jury, the prosecution struck (1) a well-educated engineer . . . and (2) a well-educated school teacher . . .").

²⁵¹ *McCleskey v. Kemp*, 481 U.S. 279, 295 n.14 (1987).

dire when they have more challenges remaining.²⁵² Also, prosecutors may not have uniform preferences for each juror: A prosecutor may, for instance, want some jurors who are leaders and some who are followers. Some courts therefore assert that prosecutors' disparate use of challenges on jurors with the same characteristics does not imply discrimination.²⁵³

4. Courts Generally Find Other Factors Cannot Prove Pretext

In addition to the inaccuracy, implausibility, or differential application of a prosecutor's proffered reason, the Supreme Court, in *Miller-El* and *Snyder*, identified other indicators of pretext, such as the pattern of challenges, the questions asked during voir dire,²⁵⁴ and the demeanor of the prosecutors while justifying the challenges.²⁵⁵ Lower courts consider these factors in making determinations, but generally find that statistics, disparate questioning, and demeanor do not prove that a proffered reason is false.²⁵⁶

In *Jacobs*, the Louisiana Supreme Court analyzed the prosecution's frequency of challenges against minority and non-minority veniremembers. Finding that the prosecution used eighty-seven percent of its challenges on racial minorities, even though the venire was more than eighty-one percent white, the court asserted that from "a purely statistical standpoint," the disparity could not be explained by chance.²⁵⁷ But the court found that it did not have to rely on statistics because it had already

²⁵² Gray v. Mississippi, 481 U.S. 648, 665 (1987).

²⁵³ See *Matthews v. Evatt*, 105 F.3d 907, 918 (4th Cir. 1997) (quoting *Burks v. Borg*, 27 F.3d 1424, 1429 (9th Cir. 1994)) ("[C]ounsel is entitled to . . . reevaluate the mix of jurors and the weight he gives to various characteristics as he begins to exhaust his peremptory challenges . . ."); *People v. Johnson*, 767 P.2d 1047, 1056-57 (Cal. 1989) ("It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. . . . These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors.").

²⁵⁴ See *supra* notes 93-94 and accompanying text.

²⁵⁵ *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003).

²⁵⁶ Professor Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment*, 61 LA. L. REV. 577 (2001), has made a related critique for employment cases, arguing that courts discount the probative value of individual pieces of evidence favorable to employees when awarding employers summary judgment and judgment as a matter of law.

²⁵⁷ *State v. Jacobs*, 32 So. 3d 227, 236 (La. 2010).

assessed the reasons proffered by the prosecution for the challenges and found them to be nondiscriminatory.²⁵⁸

The court's logic is revealed in the organization of its opinion. The initial sections are labeled by the names of veniremembers. In each of these sections, the court addressed the reasons proffered for the strikes of the given veniremember and found them not to be pretextual.²⁵⁹ The opinion's final section is devoted to the "statistical argument."²⁶⁰ Other courts employ similar logic, separately addressing the reasons proffered by the prosecution and the statistics of the prosecution's challenges, then concluding that mere statistics do not prove pretext.²⁶¹

The *Jacobs* court's analysis of the prosecution's patterns of questioning similarly reflects courts' failure to find this factor convincing. Like statistics, the court addressed disparate questioning in a separate section after it had concluded that pretext had not been demonstrated for any particular juror.²⁶² The defense argued that the prosecution asked venire panels with minority jurors if they knew anyone in jail, but did not pose this question to a panel that was composed exclusively of white veniremembers.²⁶³ Knowing that Louisiana courts have accepted a

²⁵⁸ *Id.* at 236-37.

²⁵⁹ *Id.* at 229-33 (labeling sections "Eric Hughes," "Leola Florence," and "Other prospective jurors").

²⁶⁰ *Id.* at 236.

²⁶¹ See, e.g., *State v. Benich*, No. 1 CA-CR 06-0901, 2008 WL 2641309, at *1 (Ariz. Ct. App. Jan. 10, 2008) (rejecting the defendant's statistical argument because "[d]efendant cites no case . . . in which a *Batson* challenge was granted based on statistics alone" and then separately addressing whether the defendant proved that the prosecution's proffered reasons were pretextual); *State v. Hugueley*, 185 S.W.3d 356, 374-75 (Tenn. 2006) (concluding that even though all eight of the prosecution's challenges were used against African Americans, "[t]hese bare statistics do not, in and of themselves, convince us that the State's proffered race-neutral reasons for excusing the five named persons were merely pretextual"); *Jackson v. State*, No. 2-09-023-CR, 2010 WL 1509692, at *8 (Tex. Ct. App. Apr. 15, 2010) ("Although the statistical analysis demonstrates that the State used a disproportionate number of peremptory strikes on African-Americans, our comparative analysis of veniremember 3 demonstrates that the State's reason for striking her was not pretextual, and our analysis of the State's remaining strikes on African-American veniremembers does not demonstrate discriminatory intent.").

²⁶² *Jacobs*, 32 So. 3d at 236; see also *Clay v. State*, No. 05-94-01770-CR, 1996 WL 167930, at *5 (Tex. Ct. App. April 9, 1996) (dismissing allegations of disparate questioning after having concluded in prior sections of the opinion that the prosecution's proffered reasons were not pretextual).

²⁶³ *Jacobs*, 32 So. 3d at 236.

veniremember's relationship with someone in jail as a nondiscriminatory reason for challenge,²⁶⁴ the prosecutor may have asked this question to minority veniremembers in the hope that some would respond affirmatively, providing "ammunition" for challenge.²⁶⁵

The court, however, explained away the disparate questioning. The all-white panel was the final panel, and only a few additional jurors needed to be selected; the court therefore concluded that the failure to fully question them could be motivated by expediency rather than discrimination.²⁶⁶ Other courts similarly provide explanations for disparate questioning, attributing the differences to, for example, answers given by jurors,²⁶⁷ previous questions asked by the court,²⁶⁸ or inadvertent prosecutor error.²⁶⁹ These explanations, while not necessarily inaccurate, reflect the ease with which disparate questioning can be attributed to non-discriminatory factors. Even when courts acknowledge that disparate questioning may evince a

²⁶⁴ See *id.* at 235 (noting that Louisiana courts have found that having a relative in prison is a nondiscriminatory reason for a challenge).

²⁶⁵ Such a strategy is revealed in excerpts of a training tape for jury selection made by a former Philadelphia assistant district attorney. See Jack McMahon, *Fear of a Black Jury*, HARPER'S MAG., July 2000, at 29 ("You want to ask more questions of [African Americans] so that you have more ammunition to make an articulable reason as to why you are not striking them for race.").

²⁶⁶ *Jacobs*, 32 So. 3d at 236.

²⁶⁷ See *State v. Gay*, 150 P.3d 787, 794-95 (Ariz. 2008) (finding that the prosecutor questioned an African American veniremember more extensively than a white veniremembers because the veniremember's initial answer more likely suggested a negative attitude towards law enforcement); *Bailey v. Commonwealth*, No. 2002-SC-1090-MR, 2005 WL 119619, at *4 (Ky. Jan. 20, 2005) ("The number and intrusiveness of those follow-up questions depended on the initial response from the juror, i.e., jurors who volunteered less information were asked more questions, not the race of the juror.").

²⁶⁸ *People v. Emory*, No. A122557, 2009 WL 4680009, at *6 (Cal. Ct. App. Dec. 9, 2009) ("If the prosecutor questioned J.P. more closely than others about his work history, the questions are readily explained by the fact that the court itself asked J.P. few questions on that topic . . .").

²⁶⁹ See *Brown v. State*, No. CR-07-1332, 2010 WL 3612138, at *33 (Ala. Crim. App. June 25, 2010) (finding that when the prosecutor stopped a white veniremember from answering a question, claiming—incorrectly—that the veniremember had previously answered it, "it appears that the prosecutor was simply mistaken about the veniremembers' previous responses").

discriminatory intent, they often find that factor, alone, does not prove that the state's nondiscriminatory reasons are pretextual.²⁷⁰

The Supreme Court has emphasized that the "best evidence" to determine whether a proffered reason is pretextual is often the demeanor of the prosecutor.²⁷¹ But given that prosecutors become increasingly expert at conducting voir dire in each case that they try, and that they may receive specialized voir dire training,²⁷² it is questionable whether any intent to discriminate or deceive would be revealed by their demeanor. If proffering pretextual reasons does affect demeanor, it seems unlikely that judges will be able to reliably identify these effects.²⁷³

Even if judges identify aspects of a prosecutor's demeanor that may imply deception, they may be reluctant to find that prosecutors have acted pretextually. Prosecutors are often repeat-players who have developed trusting relationships with judges.²⁷⁴

²⁷⁰ See, e.g., *Watkins v. State*, 245 S.W.3d 444, 453 (Tex. Crim. App. 2008) ("[W]hile one of the prosecutor's main lines of questioning seemed suspiciously directed toward African-Americans, the two others manifestly were not. . . . [W]e [cannot] say that this evidence, at least by itself, compels a conclusion that the trial court clearly erred [in not finding pretext]."); *State v. Lamon*, 664 N.W.2d 607, 627 (Wis. 2003) ("[R]efusal to conduct individualized voir dire of [the veniremember] may be an isolated factor arguably evidencing discriminatory intent. . . . [T]he numerous race-neutral reasons proffered by the State outweigh any alleged discriminatory intent resulting from the failure to question [the veniremember] further."). *Lamon* seems to be an especially egregious case. The day before jury selection, the state requested the address of the only African American veniremember, allegedly because his surname, Bell, was a "well known criminal name" in the area. See *Lamon*, 664 N.W.2d at 638 (Abrahamson, C.J., dissenting).

²⁷¹ *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion)).

²⁷² See William H. Farmer, *Presumed Prejudiced, But Fair?*, 63 VAND. L. REV. EN BANC 5, 7 (2010) ("Practitioners throughout the country are trained to learn the preferences and taboos of their local trial courts, state or federal, before conducting voir dire."). But see John H. Blume, Sheri Lynn Johnson & A. Brian Threlkeld, *Probing "Life Disqualification" through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1245-46 (2001) (asserting that lawyers have little training in voir dire).

²⁷³ Legal literature has used empirical evidence to critique the assumption that factfinders can determine credibility based on demeanor. See generally, e.g., Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157 (1993); Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075 (1991); Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 174-80 (2011).

²⁷⁴ See *Ex Parte Branch*, 526 So. 2d 609, 616 (Ala. 1987) (quoting a trial judge reminding the defense attorney of the experience of the prosecutors and that he "trust[s] these men when they tell [him] something as court officers"); *People v.*

Judges may therefore hesitate to find that they are lying based on ambiguous demeanor-based cues.²⁷⁵ Perhaps, most importantly, judges' decisions generally turn on defendants' ability to disprove prosecutors' proffered reasons;²⁷⁶ it is unlikely that judges will hold that a prosecutor's demeanor proves that a proffered reason is false.

This inability to find pretext based on demeanor is magnified at the appellate level. The Supreme Court has recognized that appellate courts have only transcripts and, as a result, are not "well positioned" to assess prosecutors' credibility.²⁷⁷ Trial judges' findings are therefore accorded "great deference."²⁷⁸ The *Jacobs* court accordingly supposed that the trial judge's upholding of a peremptory challenge "could have been validly based on the

Coulter, 799 N.E.2d 708, 723 (Ill. App. Ct., 2003) (Campbell, J., dissenting) (quoting a trial judge who in upholding peremptory challenges remarked, "I will never, ever have the pleasure of knowing a more honest person, a person with more integrity [as one of the prosecutors and that the other prosecutor] had the same sort of reputation."); *see also* Jose Felipe Anderson, *Catch Me If You Can! Resolving the Ethical Tragedy in the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 343, 377 (1998) ("For the lawyer who does not regularly practice before a given court, the risk of making a *Batson* challenge may be to anger the judge by challenging the integrity of a local lawyer with whom the judge has become familiar and who he may believe to be honest.").

²⁷⁵ *See* Deana Kim El-Mallawany, Comment, *Johnson v. California and the Initial Assessment of Batson Claims*, 74 FORDHAM L. REV. 3333, 3355 (2006) ("[T]he trial judge is often in the awkward position of questioning whether a prosecutor, who comes before the judge on a regular basis, is lying to the court"); Charlow, *supra* note 66, at 11 (reporting that after finding an explanation was pretextual, a judge "had the uncomfortable feeling that she had just rendered an official ruling that the attorney was lying to the court"). This situation is less likely to occur in employment cases. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 520-21 (1993) ("[T]he defendant is ordinarily *not* an individual but a company, which must rely upon the statement of an employee To say that the company which in good faith introduces such testimony . . . becomes a liar and a perjurer when the testimony is not believed, is nothing short of absurd.").

²⁷⁶ *See supra* Part II.A. (discussing judicial focus on proof of pretext).

²⁷⁷ *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003); *see also* *United States v. Armstrong*, 517 U.S. 456, 468 (1996) ("Because the judge has before him the entire venire, he is well situated to detect whether a challenge to the seating of one juror is part of a 'pattern' of singling out members of a single race for peremptory challenges." (citation omitted)). The trial judge is also able to assess veniremembers' demeanors firsthand, and therefore is better able to assess the credibility of challenges based on veniremembers' demeanor. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008).

²⁷⁸ *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986); *see also infra* notes 302-04 (discussing standards of review).

judge's personal observation of the prosecutor's demeanor."²⁷⁹ In upholding peremptory challenges, other courts similarly assert that they defer to a trial judge's assessment of pretext, despite evidence to the contrary, because of the judge's ability to assess a prosecutor's demeanor firsthand.²⁸⁰

III. FOCUS ON PROVING DISCRIMINATION

As demonstrated in Part II, defendants generally cannot prove pretext, even when courts use the factors articulated by the Supreme Court in *Miller-El* and *Snyder*. The Court, however, has provided guidance beyond just the articulation of factors. As discussed in Section A, in employment cases, the Court has prescribed that at the third step of the *McDonnell Douglas* framework, courts should focus on discrimination rather than on pretext. The Court has not made this shift explicit for peremptory challenge cases. However, *Miller-El* and *Snyder* model such an approach, which, as argued in Section B, lower courts should implement to better detect discrimination.

A. Supreme Court Shifts Focus From Pretext to Discrimination in the Employment Context

Courts analyzing peremptory challenges have generally followed the structure of the *McDonnell Douglas* framework to focus on defendants' ability to prove pretext. However, in employment cases after *McDonnell Douglas* and *Burdine*, the Court has clarified that at the third step of the analysis, courts

²⁷⁹ *State v. Jacobs*, 32 So. 3d 227, 233 (La. 2010).

²⁸⁰ See, e.g., *State v. Benich*, No. 1 CA-CR 06-0901, 2008 WL 2641309, at *5 (Ariz. Ct. App. Jan. 10, 2008) ("As pretextual as the prosecutor's reasons for striking Juror Thirteen may seem based on the written record alone, the trial court is in a much better position to determine the prosecutor's credibility than we are."); *People v. Johnson*, 767 P.2d 1047, 1056 n.6 (Cal. 1989) (rejecting a strong dissent and noting "[t]he trial judge . . . had almost 10 years of judicial experience Moreover, trial judges know the local prosecutors assigned to their courts and are in a better position than appellate courts to evaluate the credibility and the genuineness of reasons given for peremptory challenges."); *People v. Dimas*, No. B223795, 2011 WL 1227395, at *3-4 (Cal. Ct. App. Apr. 4, 2011) (giving considerable deference to the trial judge because of his "knowledge of local conditions and local prosecutors, powers of observation, understanding of trial techniques, and judicial experience" and rejecting the defendant's *Batson* claim because the judge "made a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered by the prosecutor.").

must determine whether an employer discriminated, not whether an employer's reason was pretextual.²⁸¹ In *St. Mary's Honor Center v. Hicks*, the Court held that proof that an employer's proffered reason is pretextual does not necessitate a judgment for the plaintiff.²⁸² Instead, as clarified by the Court in *Reeves v. Sanderson Plumbing Products*, "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination."²⁸³

The Court has not directly stated whether its holdings from *Hicks* and *Reeves* apply in the *Batson* context. In *Miller-El* and *Snyder*, the Court suggested that, in contrast with employment cases, proof of pretext is generally sufficient to prove discrimination.²⁸⁴ Scholars have also argued for such a view. Employers' evidence of nondiscriminatory reasons must necessarily come through the testimony of or the documents produced by individual employees, who may not have full knowledge of the motivations of other agents and may act for self-serving reasons. Disproof of their proffered reasons may therefore not persuade courts that the real reason was discriminatory.²⁸⁵

²⁸¹ See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 518-19 (1993) ("Once the defendant 'responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide' not . . . whether that evidence is credible, but 'whether the rejection was discriminatory') (quoting *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983)).

²⁸² *Id.* at 511.

²⁸³ 530 U.S. 133, 147 (2000).

²⁸⁴ In *Miller-El*, the Court suggested that in peremptory challenge cases, proof of pretext tends to prove purposeful discrimination, which contrasts with employment cases where proof of pretext is "simply one form of circumstantial evidence." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). The Court made the same contrast in *Snyder* and also cited the plurality statement from *Hernandez v. New York* that "[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008) (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)).

²⁸⁵ See David A. Sutphen, Note, *True Lies: The Role of Pretext Evidence under Batson v. Kentucky in the Wake of St. Mary's Honor Center v. Hicks*, 94 MICH. L. REV. 488, 505 (1995) ("[A] company . . . is forced to rely on the testimony and recollection of various employees regarding their state of mind or the actions and motivations of other employees, all of which makes it extremely difficult specifically to identify the 'real' motivation for the adverse employment action."); see also *Hicks*, 509 U.S. at 520 ("[A] company . . . must rely upon the statement of an employee—often a relatively low-level employee—as to the central fact To say that the company which in good faith

But for peremptory challenges, prosecutors give their reasons without intermediary, so if the court does not believe the reasons, discrimination seems a highly likely alternative.²⁸⁶

B. Courts Should Shift Focus From Pretext to Discrimination in the Batson Context

While the Court in *Miller-El* and *Snyder* declined to adopt the holding from *Hicks* and *Reeves* that a finding of pretext does not necessitate a finding of discrimination, the peremptory challenge cases do reflect the employment cases' holding that pretext is just one way in which discrimination may be proven. The Court, particularly in *Miller-El*, did not find whether the defendant had disproven the prosecution's proffered reason for any given juror to be dispositive. Instead, it determined whether the sum of the prosecution's actions during voir dire was more likely explained by the proffered reasons or by discrimination. By framing their analysis with statistics, inquiring into the most likely explanation for prosecutorial actions, and focusing on discrimination rather than individual challenges, lower courts should use this Supreme Court model to guide their assessment of peremptory challenges.

1. Frame Analysis with Statistics

In *Miller-El*, the Court framed its inquiry with the statistics of the prosecution's challenges. After setting out the facts and procedural posture, the Court began its analysis by asserting, "[t]he numbers describing the prosecution's use of peremptories are remarkable."²⁸⁷ The Court noted that of the eleven black veniremembers who were not excused for cause or by agreement of the parties, ten were peremptorily challenged by the prosecution.²⁸⁸ In *Jacobs*, the Louisiana Supreme Court also mentioned a statistical disparity—the prosecution used eighty-seven percent of its peremptory challenges on veniremembers of

introduces such testimony . . . becomes a liar and a perjurer when the testimony is not believed, is nothing short of absurd.").

²⁸⁶ Cavise, *supra* note 162, at 539-40; Sutphen, *supra* note 285, at 505-08.

²⁸⁷ *Miller-El*, 545 U.S. at 240.

²⁸⁸ *Id.* at 240-41.

racial minorities, even though such veniremembers made up less than nineteen percent of the venire—but did so at the end of its analysis, when it had already found that the prosecution's reasons were not pretextual.²⁸⁹

Statistical disparities may not be dispositive. The Supreme Court has indicated that the Equal Protection Clause only prohibits intentional discrimination,²⁹⁰ which cannot generally be proven with statistics alone.²⁹¹ Nonetheless, a marked difference in the percentages of white and minority veniremembers challenged casts doubt on the prosecution's intent. Whereas the *Jacobs* court dismissed the statistics at the end of its analysis,²⁹² the Supreme Court in *Miller-El* framed its analysis around the statistics, asserting that they were unlikely to have occurred by "[h]appenstance."²⁹³

2. Inquire into Most Likely Explanation for Prosecutorial Action

In *Miller-El*, the Supreme Court carried its initial question, whether the statistics were more likely explained by discrimination or coincidence, throughout its analysis. When a prosecutor, while explaining the reasons for a challenge, mischaracterized a veniremember's answer to a voir dire question, the Court inquired whether the prosecutor's actions were more

²⁸⁹ See *supra* notes 257-59 (discussing use of statistics in *Jacobs*).

²⁹⁰ *Supra* note 66.

²⁹¹ See *McCleskey v. Kemp*, 481 U.S. 279, 308-09 (1987) (holding that a statistical difference in the imposition of the death penalty between black and white defendants did not prove that the state had intentionally discriminated in a specific case); *Washington v. Davis*, 426 U.S. 229, 246-48 (1976) (finding that a racially disproportionate impact of an employment test does not prove that the test was purposely discriminatory); *Jefferson v. Hackney*, 406 U.S. 535, 549 (1972) (finding that a statistical difference in state funding of welfare programs used by minority and nonminority residents does not prove intentional discrimination). The Court has found that statistics may be dispositive when they reveal a near-complete exclusion of minorities. In *McCleskey*, 481 U.S. at 294 n.12, the Court distinguished the purported disparate impact of the death penalty from *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), in which a state legislature redefined a city's boundaries to exclude 395 of 400 black voters but not a single white voter, and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), in which a city provided laundry permits to all but one white applicant but no Chinese applicants.

²⁹² See *supra* notes 259-60 and accompanying text.

²⁹³ *Miller-El*, 545 U.S. at 241 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003)).

likely caused by misunderstanding or were evidence of discrimination.²⁹⁴ When the prosecution chose to rearrange the venire when African Americans were at the front, thereby minimizing the probability of African Americans serving,²⁹⁵ the court theorized that while legitimate reasons could explain the shuffling, none had been offered, so discrimination seemed to be a likely explanation.²⁹⁶

Language about which explanation was more likely—that tendered by the prosecution or discrimination—permeates the opinion. Looking at the prosecution’s disparate questioning, the Court found that discrimination provides “a much tighter fit of fact and explanation”; that “[a]s between the State’s ambivalence explanation and Miller-El’s racial one, race is much the better”;²⁹⁷ and that the prosecution’s proffered explanations “fit the evidence less well than the racially discriminatory hypothesis.”²⁹⁸ Looking at the overall pattern of prosecutorial challenges, the Court found that “[t]he strikes correlate with no fact as well as they correlate with race.”²⁹⁹ This inquiry makes salient that to show the prosecution has acted discriminatorily, the defendant need only persuade the court by a preponderance of the evidence.

Accordingly in *Jacobs*, the Louisiana Supreme Court, rather than inquiring whether given nondiscriminatory reasons were “plausible”³⁰⁰ or “masked a racially-discriminatory intent,”³⁰¹ should have analyzed whether the reasons were the most likely explanations for the prosecutor’s challenges. Was veniremember Jordan more likely challenged because of his shorts or his race?

²⁹⁴ *Id.* at 244.

²⁹⁵ Texas criminal law allows parties to shuffle the order of the venire. *Id.* at 253 n.12 (citing TEX. CODE CRIM. PROC. ANN. art. 35.11 (West 2006)). The Court noted that the prosecution requested shuffles on two occasions when African American veniremembers were in the front of the panel. *Id.* at 253. In Texas, veniremembers are seated on the petit jury one-by-one, TEX. CODE CRIM. PROC. ANN. art. 35.20 (West 2006), so if the prosecution (or defense) wants to avoid seating veniremembers at the front of the panel without having to use peremptory challenges, it can request a shuffle, thereby moving them to the back.

²⁹⁶ *Miller-El*, 545 U.S. at 254–55.

²⁹⁷ *Id.* at 260.

²⁹⁸ *Id.* at 266.

²⁹⁹ *Id.*

³⁰⁰ *State v. Jacobs*, 32 So. 3d 227, 230 (La. 2010).

³⁰¹ *Id.* at 235.

Was it more likely that the prosecution engaged in disparate questioning because of expedience or because of race? While the defendant has the burden of proof in these questions, courts must keep in mind the overall statistics of the challenges, which may impugn any explanations proffered by the prosecution.

While a trial court can simply look at which explanation is more likely, the inquiry is more nuanced for appellate courts. The Supreme Court has held that trial court findings are given “great deference.”³⁰² While standards may differ by state, on direct review of *Batson* challenges, federal courts use the clearly erroneous standard.³⁰³ On habeas review, the standard is even higher: The Antiterrorism and Effective Death Penalty Act of 1996 requires the defendant to show the state conclusion to be “an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”³⁰⁴

Even the demanding habeas standard, however, should not change the structure of courts’ analyses. *Miller-El* was a habeas case and the Supreme Court still structured its analysis around whether discrimination was a more convincing explanation than those offered by the prosecution. After asking this question repeatedly throughout its decision—and finding that discrimination was often the more persuasive answer—the Court found that the state court’s decision was “unreasonable as well as erroneous” and “shown up as wrong to a clear and convincing degree.”³⁰⁵

3. Focus on Discrimination

The Supreme Court reached this conclusion in *Miller-El* because it did not focus on each challenge made by the prosecution in isolation, but on the accumulation of evidence of discrimination. The Court noted that while individual pieces of evidence are “open

³⁰² See *supra* notes 277-80 and accompanying text (discussing deference given to trial court findings that prosecutors have not discriminated).

³⁰³ *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). But see Bryan Adamson, *Critical Errors: Courts’ Refusal to Recognize Intentional Race Discrimination Findings as Constitutional Facts*, 28 YALE L. & POL’Y REV. 1 (2009) (arguing that, as constitutional facts, findings of intentional discrimination should be subjected to less-deferential review).

³⁰⁴ *Miller-El*, 545 U.S. at 240 (quoting 28 U.S.C. § 2254(d)(2) (2006)).

³⁰⁵ *Id.* at 266.

to judgment calls," the evidence "viewed cumulatively . . . is too powerful to conclude anything but discrimination."³⁰⁶ The Court found similarly in *Snyder v. Louisiana*, citing *Miller-El* for the proposition that "all of the circumstances that bear upon the issue of racial animosity must be consulted."³⁰⁷

In *Miller-El*, the Court engaged in the paradigmatic pretext analyses, examining whether the reasons were applicable to the challenged veniremembers, whether the reasons were plausible, and whether they could also be applied to unchallenged white veniremembers.³⁰⁸ But the Supreme Court did not rest its holding on a finding that the prosecution's explanations for any given juror were pretextual. Instead, it asserted that "[t]he whole of the *voir dire* testimony . . . casts the prosecutor's reasons . . . in an implausible light."³⁰⁹

Similarly, in *Snyder*, the Court asserted that the prosecution's discriminatory intent should not be analyzed separately for each juror, but that discrimination should be inferred from the prosecution's cumulative use of challenges. The Court found that the prosecution's nondiscriminatory reason for one veniremember was so unconvincing as to necessitate reversal, but emphasized that "if there were persisting doubts as to the outcome, a court would be required to consider the strike of [one veniremember] for the bearing it might have upon the strike of [another veniremember]."³¹⁰

The Court's focus on the cumulative evidence of intentional discrimination is highlighted by Justice Thomas's dissent. Arguing, "the majority finds that a succession of unpersuasive arguments amounts to a compelling case,"³¹¹ Justice Thomas discounted each piece of evidence relied on by the majority. Given the limited information available to the prosecution, it was reasonable to interpret a veniremember's answer as favoring the

³⁰⁶ *Id.* at 265.

³⁰⁷ *Snyder*, 552 U.S. at 478.

³⁰⁸ *Miller-El*, 545 U.S. at 242-52.

³⁰⁹ *Id.* at 252.

³¹⁰ *Snyder*, 552 U.S. at 478.

³¹¹ *Miller-El*, 545 U.S. at 286 (Thomas, J., dissenting). Justice Thomas also argued that the majority improperly considered evidence that was not presented to the state courts. *Id.* at 279-85.

defendant;³¹² the white veniremembers who may have similarly favored the defendant were questioned later in voir dire when the prosecution had fewer challenges remaining;³¹³ the white veniremembers who were not challenged could be distinguished from the challenged black veniremembers;³¹⁴ many reasons could explain the shuffling of the venire;³¹⁵ the disparate questioning could be attributed to differing answers given by veniremembers;³¹⁶ and there was no evidence that any of the prosecutors who tried *Miller-El* had ever read the discriminatory jury-selection manual used in the district attorney's office.³¹⁷ Accordingly, Justice Thomas individually dismissed each piece of evidence as insufficient to prove pretext. But rather than ask whether each factor alone was sufficient, the majority focused on the broader question of whether, based on all of the available evidence, the prosecution had discriminated. Although, as demonstrated in Part II, many courts continue to focus on pretext, some courts have cited *Miller-El* for the proposition that the prosecution's actions must be evaluated as a whole to see if discrimination in the most likely explanation.³¹⁸

In *Jacobs*, the Louisiana Supreme Court took an approach similar to that of Justice Thomas, addressing each nondiscriminatory reason individually, finding that the defendant had not proven them pretextual,³¹⁹ and dismissing other factors as insufficient to prove pretext.³²⁰ The court should have followed the majority by evaluating the totality of the prosecution's actions.

³¹² *Id.* at 292.

³¹³ *Id.* at 290.

³¹⁴ *Id.*

³¹⁵ *Id.* at 305.

³¹⁶ *Id.* at 296-302.

³¹⁷ *Id.* at 305.

³¹⁸ See, e.g., *Flowers v. State*, 947 So. 2d 910, 937 (Miss. 2007) ("While each individual strike may have justifiably appeared to the trial court to be sufficiently race neutral, the trial court also has a duty to look at the State's use of peremptory challenges *in toto*." (citing *Miller-El*, 545 U.S. at 252); *Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 526 (Tex. 2008) ("After examining the totality of the circumstances, we conclude that race explains Fisk's strikes of Daigle and Pickett better than any other reason . . .") (citing *Miller-El*, 545 U.S. at 266).

³¹⁹ See *supra* Part II.A.2. (discussing the court's analysis of the prosecution's nondiscriminatory reasons).

³²⁰ See *supra* Part II.C.4. (discussing the court's analysis of statistics, disparate questioning and demeanor).

In addition to the statistical framing³²¹ and the evidence that bore directly on pretext—explanations that seemed implausible,³²² lacked connection to the facts of the case,³²³ were not developed during voir dire,³²⁴ and applied to unchallenged white veniremembers³²⁵—the prosecution also engaged in disparate questioning,³²⁶ and there was outside evidence of discrimination by the district attorney's office. Upon reversing an initial trial of Jacobs for unrelated reasons, the Louisiana Supreme Court warned the trial court that the prosecution's use of peremptory challenges raised questions of discrimination.³²⁷ Most shockingly, before the second trial, the prosecutors came to court dressed in ties decorated with nooses.³²⁸ These factors are not directly related to a prosecutor's proffered explanations and, perhaps, individually, can be explained away. Consequently, a court focusing on pretext risks overlooking intentional discrimination.

CONCLUSION

This Article's proposed shift in focus is not a cure-all. For those courts that continue to defer to prosecutors' explanations despite evidence to the contrary, a mandate to use a different focus will not be effective. And for courts that thoroughly scrutinize prosecutors' motives, the difficulty of determining whether a prosecutor has challenged a juror based on a good-faith guess or discrimination remains. Detecting discrimination will be especially difficult when its effects are more subtle, and, for

³²¹ See *supra* notes 257-60 (discussing use of statistics in *Jacobs*).

³²² See *supra* notes 202-04 and accompanying text. On remand, the appellate court analyzed two other jurors who were challenged for seemingly improbable reasons. See *supra* note 124 (discussing progression of *Jacobs* through the Louisiana courts). The prosecution struck one veniremember ostensibly because she wanted the defendant to testify and another veniremember because when asked during voir dire what she would worry about if her child ran away—the defendant had run away from home—the veniremember responded that she would worry about her child being hurt. The court upheld both challenges. *State v. Jacobs*, 67 So. 3d 535, 556-58 (La. Ct. App. 2011).

³²³ See *supra* notes 209-10 and accompanying text.

³²⁴ See *supra* notes 202-04 and accompanying text.

³²⁵ See *supra* note 248 and accompanying text.

³²⁶ See *supra* notes 262-65 and accompanying text.

³²⁷ *State v. Jacobs*, 789 So. 2d 1280, 1283 n.2 (La. 2001).

³²⁸ Brief for Defendant, *supra* note 184, at 4.

example, the statistics are not overly skewed and the questioning does not appear disparate.

Nonetheless, this Article contends that a movement away from the current focus on pretext will improve courts' identification of discrimination. Mathematically, pretext and discrimination may be equivalent: If a prosecutor discriminates, the proffered nondiscriminatory reason is pretextual, and if the prosecutor's nondiscriminatory reason is pretextual, the prosecutor is discriminating.³²⁹ This equivalency does not, however, imply that courts are equally likely to find pretext as they are to find discrimination. This Article has argued that because prosecutors have so much flexibility in the nondiscriminatory reasons that they can proffer, it is extremely difficult for defendants to show any given reason is pretextual, even when courts employ factor tests to evaluate pretext.

The *McDonnell Douglas* framework is still helpful for its requirement that prosecutors provide nondiscriminatory reasons. But, as dictated by the Court in its post-*McDonnell Douglas* employment decisions, disproof of nondiscriminatory reasons is only one means of proving discrimination. Courts analyzing peremptory challenges are more likely to identify discrimination if, rather than focusing on pretext, they follow the Supreme Court in *Miller-El* and *Snyder* to ask whether, taking all of the prosecution's actions into account, discrimination is the most likely explanation for the prosecution's actions.

³²⁹ This leaves aside the question of unconscious discrimination, in which prosecutors offer reasons that they believe are legitimate, but are actually discriminatory. See *supra* note 65 (discussing unconscious discrimination). It also assumes that prosecutors do not proffer nondiscriminatory reasons to conceal other nondiscriminatory reasons. See *supra* Part III.A. (discussing the distinction between pretext and discrimination).

COMMENT

FACEBOOK FACTS AND TWITTER TIPS—PROSECUTORS AND SOCIAL MEDIA: AN ANALYSIS OF THE IMPLICATIONS ASSOCIATED WITH THE USE OF SOCIAL MEDIA IN THE PROSECUTION FUNCTION

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INTRODUCTION

Modern society has become increasingly dependent on technology. An estimated 294 billion emails are sent daily, resulting in 107 trillion emails alone in 2010.¹ One area of technology that has experienced tremendous growth in recent years is social networking websites.

Social networking websites can be defined as “web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.”² The three types of social interactions that social networking enables include (1) creation of an online *identity*, (2) establishment of *relationships* between users, and (3) development of layered *communities* defined by the lists of connections each user establishes.³

One of the well-known common social networking websites, Facebook, currently has more than 800 million active users.⁴ Those users in the United States alone represent sixty-five percent of the global audience.⁵ Another quickly evolving social networking website, Twitter, has over 200 million accounts.⁶ Twitter users account for approximately sixty-eight million tweets per day, resulting in twenty-five billion tweets in the year 2010 alone.⁷ Twitter is similar to Facebook in terms of linking people based on profile information and in allowing users to communicate

¹ *Internet 2010 in Numbers*, PINGDOM (Jan. 12, 2011), <http://royal.pingdom.com/2011/01/12/internet-2010-in-numbers/>.

² Bill Sherman, *Your Mayor, Your “Friend”: Public Officials, Social Networking, and the Unmapped New Public Square*, 31 PACE L. REV. 95, 98 (2011) (quoting Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMMUN. 210, 211 (2007)).

³ James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137, 1151-59 (2009).

⁴ *Statistics*, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited Jan. 22, 2012); see also CHECKFACEBOOK, <http://www.checkfacebook.com/> (last visited Jan. 22, 2012).

⁵ *Id.*

⁶ Tom Johansmeyer, *200 Million Twitter Accounts . . . But How Many Are Active?*, SOCIAL TIMES (Feb. 3, 2011, 11:15 AM), http://socialtimes.com/200-million-twitter-accounts-but-how-many-are-active_b36952.

⁷ *Internet 2010 in Numbers*, *supra* note 1.

directly through their cell phones.⁸ With Twitter, users post “tweets,” or statements limited to 140 characters, and “followers” receiving those “tweets” can then make responsive comments.⁹ Like Facebook, Twitter accounts are not limited to individuals, with users ranging from organizations like the American Bar Association and various law schools, to individual attorneys, politicians, athletes, and celebrities.¹⁰ These social networks offer an opportunity for prosecutors to build and maintain their professional networks, while presenting a fast and efficient way to exchange information in order to stay connected. Law enforcement professionals can utilize social networks to help with crime prevention, community outreach, and press relations.¹¹

In the ever-growing realm of virtual reality, new technologies create interesting challenges to long-established legal concepts. Prosecutors across the country are utilizing social networking sites like Facebook and Twitter to research information about the backgrounds of parties, witnesses, opposing counsel, jurors, and even judges. In doing so, prosecutors may encounter limits on the discovery and admissibility of content collected from such sites. Furthermore, prosecutors may face legal ethics issues or disciplinary action related to the various aspects of social networking. Part I evaluates the benefits of social networking available for prosecutors as both individual attorneys and elected officials. Part II analyzes the ethical implications associated with various aspects of social media, including prosecutorial postings, ex parte communications, and juror misconduct. Part III examines the consequences of violating ethical rules as related to social media and considers the immunity protections prosecutors may

⁸ See, e.g., Angela O'Brien, *Are Attorneys and Judges One Tweet, Blog or Friend Request Away From Facing a Disciplinary Committee?*, 11 LOY. J. PUB. INT. L. 511 (2010).

⁹ *About Twitter*, TWITTER, <http://www.twitter.com/about> (last visited Jan. 22, 2012).

¹⁰ *Id.* Additionally, more and more businesses have started marketing campaigns via social networking websites, measuring success in terms of how many “followers” on Twitter and how many “friends” and “likes” on Facebook. See, e.g., Ten Elvis, *Social Media Contest Ideas – Social Media & SEO Tips Powered by Majestic Social Media!*, MAJESTIC SOCIAL MEDIA (Mar. 8, 2011), <http://www.articlesbase.com/social-marketing-articles/social-media-contest-ideas-social-media-seo-tips-powered-by-majestic-social-media-4370216.html>.

¹¹ See *infra* notes 12-24 and accompanying text.

claim when faced with potential lawsuits challenging their actions.

I. BENEFITS OF SOCIAL NETWORKING, SPECIFICALLY FOR PROSECUTORS

People everywhere are harnessing the power of social networking websites to their advantage, and prosecutors are no exception. Prosecutors have established social networking sites to help fight crime,¹² promote awareness within the community,¹³ and market their professional services.¹⁴

Social networking websites provide another outlet for community members to call in with “tips” to help fight reprehensible crimes, allowing prosecutors to gather information from the community more efficiently.¹⁵ For example, police officers and prosecutors in Houston, Texas followed electronic trails and evaluated comments and photos to catch a child molester.¹⁶ Similarly, the Dallas Police Department posted a surveillance video of a robbery on its Facebook page in hopes of identifying the

¹² See *Montgomery County District Attorney*, FACEBOOK, <http://www.facebook.com/home.php#!/pages/Montgomery-County-District-Attorney/96910904678?sk=info> (last visited Jan. 22, 2012). The Montgomery County District Attorney’s office posts official press releases on its Facebook page and encourages citizens to provide any additional information related to unsolved crimes. *Id.* Additionally, the office posts pictures (or mug shots) of individuals after arrests have been made. *Id.* This helps publicize information regarding those charged with crimes to the general public.

¹³ See *Cuyahoga County Prosecutor’s Office*, FACEBOOK, <http://www.facebook.com/home.php#!/pages/Cuyahoga-County-Prosecutors-Office/165402593480208?sk=info> (last visited Jan 22, 2012) (posting public interest cases on a weekly basis and providing reminders of upcoming community events).

¹⁴ See *Marion County Prosecutor’s Office*, FACEBOOK, <http://www.facebook.com/search.php?q=Marion%20County%20Prosecutor%E2%80%99s%20Office&type=all&init=srp#!/MCPProsecutors?sk=info> (last visited Jan. 22, 2012) (taking a marketing approach and publicizing positive photos and articles regarding the prosecutor’s office).

¹⁵ See @RivCoDa, *Riverside County District Attorney’s Office*, TWITTER (May 20, 2010, 6:38 PM), <http://twitter.com/#!/RivCoDA> (“A child molester is on the run. Have you seen him? Report a tip to Crime Stoppers at (760) 341-STOP.”); see also *supra* note 12 and accompanying text.

¹⁶ Courtney Zubowski, *Prosecutors Using Social Networking Skills in Court Cases*, KHOU (Mar. 18, 2010, 10:36 PM), <http://www.khou.com/news/local/Harris-County-Prosecutors-Using-Social-Networking-Skills-in-Court-88500432.html>.

suspects, and community members were able to post information regarding the incident in response.¹⁷

Additionally, social media allows prosecutors to educate the community in crime prevention practices. When a prosecutor's office can readily access a large majority of its citizens, it is vital to provide the community with as much information as possible. Prosecutors can use social media to update the community about neighborhood watch programs, women's self-defense classes, gang awareness conferences,¹⁸ or coordinate efforts in finding missing persons.

Police departments across the country have recently taken advantage of social networks as well to serve a variety of needs in their local communities. Many departments have followed a similar format on their social networking sites: including press release-type information, photos of suspect mug shots and officers involved in community events, and additional information on weather updates, school closings, and crime-stoppers' tips.¹⁹ For instance, the Atlanta Police Department's Facebook page has over 1500 Facebook fans,²⁰ the Dallas Police Department Facebook page has more than 7600 fans,²¹ the Chicago Police Department has almost 22,000 Facebook fans,²² and the New York City Police Department has over 22,400 followers on Twitter;²³ each with the

¹⁷ *Dallas Police Department*, FACEBOOK, <https://www.facebook.com/home.php#!/pages/Dallas-Police-Department/126927037411> (last visited Jan. 22, 2012).

¹⁸ See @ManhattanDA, *Cyrus Vance, Jr.*, TWITTER (Mar. 15, 2011, 11:19 PM), <http://twitter.com#!/ManhattanDA> ("DA Vance speaks at a Gang Awareness workshop . . .").

¹⁹ Sara Inés Calderón, *Police Use Facebook to Fight Crime, Talk to Residents*, INSIDE FACEBOOK (Feb. 19th, 2010), <http://www.insidefacebook.com/2010/02/19/police-use-facebook-to-fight-crime-talk-to-residents/>. As an example, the Oxford, Mississippi Police Department posts twenty-four hour summaries of department actions including arrests, citations, and vehicular accident reports. See *Oxford MS Police Department*, FACEBOOK, <http://www.facebook.com/pages/Oxford-MS-Police-Department/276424854506?sk=wall> (last visited Jan. 22, 2012).

²⁰ *City of Atlanta Police Department*, FACEBOOK, <https://www.facebook.com/pages/City-of-Atlanta-Police-Department/55588696911?sk=info> (last visited Jan. 22, 2012).

²¹ *Dallas Police Department*, FACEBOOK, <https://www.facebook.com/DallasPD> (last visited Jan. 22, 2012).

²² *Chicago Police Department*, FACEBOOK, <https://www.facebook.com/ChicagoPoliceDepartment> (last visited Jan. 22, 2012).

²³ See @NYPDnews, *NYPD NEWS*, TWITTER, <http://twitter.com#!/NYPDnews> (last visited Jan. 22, 2012).

goal of creating a conversational site that consistently engages community members on a local level.

Social networking websites offer an opportunity to publicize the work of the prosecutors, as well as present alternative outlets for accessibility to the public by providing contact information, safety tips, and other valuable information.²⁴

A. Elected Officials

As an elected official, the prosecutor plays an indispensable role in the community. Social networking websites allow prosecutors to stay connected to the local community in a number of ways. For example, sites like Facebook and Twitter offer both inbound and outbound communication to a large number of people.²⁵ Prosecutors can post comments or “tweet” updates as mini press releases,²⁶ and community members can respond with feedback.²⁷ Some prosecutorial social networks even act as avenues for fundraising.²⁸

Additionally, as an elected or appointed official, a prosecutor may also use social media to help stay in touch with voters, control his or her public image, and update the public on the achievement of his or her campaign goals. For instance, the current Philadelphia District Attorney was elected after successfully utilizing his Twitter account throughout his campaign.²⁹

Social media also offers prosecutors the opportunity to reach more people through a completely new technological avenue. One author recently described the unique nature of the “civic social

²⁴ See *supra* note 12 and accompanying text.

²⁵ See *supra* notes 12-24 and accompanying text.

²⁶ For a discussion of the ethical implications of the mini press releases as statements to the media, see *infra* notes 122-38 and accompanying text.

²⁷ For example, Bill Gibbons, Shelby County, Tennessee District Attorney frequently “tweets” about his speaking events and book signings to which constituents respond. See @DABillGibbons, *Bill Gibbons*, TWITTER, <http://twitter.com/#!/DABillGibbons> (last visited Jan. 22, 2012).

²⁸ Facebook friends can “Like” a specific post, and money can be donated with each “Like.”

²⁹ Seth Williams successfully used his Twitter account to update constituents on speaking engagements and events. Since being elected, @Seth4DA frequently tweets city statistics like, “Sadly, there have been 200 homicides in Philadelphia this year.” @Seth4DA, *Seth4DA*, TWITTER (Aug. 23, 2010, 9:36 PM), <http://twitter.com/#!/Seth4DA>.

network” as “an emerging political institution, characterized by a high degree of transparency and intense public pressure for accountability.”³⁰ Moreover, because of their capacity for mass communication, social networks can be seen as “the new public square.”³¹ Thus, it is important for prosecutors and other elected officials to take advantage of every opportunity online to be accessible to potential voters in this new public forum.

B. Voir Dire

Prosecutors may also take advantage of social media in trial scenarios, especially during voir dire. For some attorneys, utilizing information on social networking sites is merely taking advantage of every available tool in the public domain. Websites like Facebook and Twitter allow attorneys to learn more than the bare minimum about potential jurors, extending research beyond the basic name, religion, employer, and number of children provided.³² Many attorneys consider it a fundamental right to learn more about jurors;³³ and the additional online research further ensures a fair jury, since it allows both prosecutors and defense attorneys to get to know the biases of potential jurors.³⁴

In Wi-Fi compatible courtrooms, prosecution and defense attorneys using iPads, smart phones, or laptops are able to cross-check background information of prospective jurors.³⁵ They take into consideration potential jurors’ favorite television shows, interests and hobbies, and religious affiliations.³⁶ The district

³⁰ Sherman, *supra* note 2, at 95-96.

³¹ *Id.*

³² Ethical implications associated with this research are discussed *infra* Part II.

³³ 76 AM. JUR. *Trials* § 127 (2000). Both prosecution and defense attorneys scour the sites looking for personal information that may be helpful in selecting jurors, particularly with the ultimate goal of finding the specific juror more inclined to choose their side at trial.

³⁴ Amanda McGee, Comment, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 317-18 (2010) (“Trial counsel are already given broad discretion when questioning potential jurors during voir dire in order to expose their biases and potential prejudices.”).

³⁵ Ana Campoy & Ashby Jones, *Searching for Details Online, Lawyers Facebook the Jury*, WALL ST. J., Feb. 22, 2011, at A2.

³⁶ *Id.* Josh Marquis, District Attorney of Clatsop County in Oregon, described the importance of even the smallest details. *Id.* For example, if a person’s favorite

attorney's office in Cameron County, Texas frequently engages in cross-checking potential jurors.³⁷ In doing so, the prosecutor is able to anticipate what the defense may already know about a potential juror.³⁸ Depending on the specific information attorneys find about potential jurors online, they may then convince judges to eliminate jurors "for cause."³⁹ On the other hand, if the information discovered is negative, but cannot support a challenge "for cause," an attorney may decide to use one of their "precious peremptory challenges" to strike the juror at issue.⁴⁰

Consider the prospective jurors summoned for service in the highly publicized murder trial of Casey Anthony—charged with killing her two-year-old daughter.⁴¹ While potential jurors answered questions about their backgrounds and qualifications to serve, lawyers were able to instantaneously check those responses against online social media websites.⁴² Prosecutors then used a peremptory challenge to prevent the seating of one particular person who, after a fender-bender, tweeted "Cops in Florida are

television show is *CSI: Crime Scene Investigation* or *Law & Order*, it could give the potential juror unrealistic expectations about the trial.

³⁷ Laura B. Martinez, *District Attorney to use Facebook Profiles in Jury Selection*, BROWNSVILLE HERALD (Jan. 17, 2011), <http://www.brownsvilleherald.com/articles/district-121729-attorney-use.html>.

³⁸ *Id.* Cameron County District Attorney Armando R. Villalobos stated, "You always want to be ahead of the defense bar or at least on par with it" *Id.* Defense lawyers often assert that prosecutors already have an advantage in researching backgrounds and criminal records of potential jurors and not sharing the information could result in an unfair panel; thus, use of social media would balance the scales. See, e.g., Anne Constable, *Background Checks of Jurors Routine: Use of National Crime Information Center Database, as in Fierro Trial, not as Common*, SANTE FE NEW MEXICAN (Sept. 23, 2009), <http://www.santafenewmexican.com/LocalNews/Background-checks-of-jurors-routine> ("Jury selection is supposed to be an open process in which everyone has the same chance to strike or keep a juror. [Currently, the scales are tipped] unfairly toward the prosecution." (alteration to original) (internal quotation marks omitted)).

³⁹ Anita Ramasastry, *Googling Potential Jurors: The Legal and Ethical Issues Arising From the Use of the Internet in Voir Dire*, FINDLAW (May 30, 2010), <http://writ.news.findlaw.com/ramasastry/20100730.html>.

⁴⁰ *Id.*

⁴¹ *State v. Anthony*, No. 2008CF15606, 2011 WL 2641392 (Fla. Cir. Ct. July 7, 2011).

⁴² Associated Press, *Social Media Affects Jury Picks in Casey Anthony Case*, DAYTONA BEACH NEWS J. (May 15, 2011), <http://www.news-journalonline.com/news/florida/2011/05/15/social-media-affects-jury-picks-in-casey-anthony-case.html>.

idiots and completely useless.”⁴³ Thus, prosecutors were able to prevent a potentially biased juror from being seated.

Under the duty of zealous representation or prosecution, lawyers may have an obligation to look into what potential jurors are saying on social media sites.⁴⁴ A recent Missouri decision implied that lawyers have a duty to perform a requisite amount of research on jurors prior to trial.⁴⁵ Various appellate courts have upheld attorneys’ rights to research jurors online, including one in New Jersey that reversed a lower-court judge’s ruling prohibiting a plaintiff’s attorney from using the Internet in the courtroom.⁴⁶ In that case, the court determined, “[t]he fact that the plaintiff’s lawyer had the foresight to bring his laptop computer to court and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of fairness or maintaining a level playing field.”⁴⁷ Thus, prosecutors may gain an advantage by installing necessary technological equipment in their local courtrooms.

Utilizing information from Facebook profiles and other social networking websites during voir dire, however, involves considerable risks. Sometimes the searches can extend far beyond the basic “Google” inquiry, reaching into personal, privacy-protected, social networking sites. For instance, if the individual has restricted privacy settings that prohibit the general public from accessing information, and an attorney improperly accesses

⁴³ *Id.*

⁴⁴ See generally CAROLYN ELEFANT & NICOLE BLACK, SOCIAL MEDIA FOR LAWYERS: THE NEXT FRONTIER (2010).

⁴⁵ *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010). In *Johnson*, a potential juror in a medical malpractice suit denied he had been a party to any civil litigation. *Id.* at 554-55. After a verdict for the defense, the plaintiff’s attorney filed for a new trial. *Id.* at 555. The state’s highest court determined “a party must use reasonable efforts to examine the litigation history on [the case record service] of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial.” *Id.* at 559. In holding that the juror had acted improperly, the Court observed that a more thorough investigation of the juror’s background would have obviated the need to set aside the jury verdict and conduct a retrial. See, e.g., New York Cnty. Lawyers’ Ass’n Comm. on Prof’l Ethics Op. 743 (2011).

⁴⁶ *Campoy & Jones*, *supra* note 35; see, e.g., *Carino v. Muenzen*, No. L-0028-07, 2010 WL 3448071 (N.J. Super. Ct. App. Div. Aug. 30, 2010).

⁴⁷ *Id.* (internal quotation marks omitted).

that information through alternative means,⁴⁸ those attorneys may open themselves up to possible malpractice suits or disciplinary action.⁴⁹ Model Rule of Professional Conduct 3.5 governs improper juror contact, which may be applicable to these types of situations.⁵⁰ Prosecutors investigating potential jurors on the Internet must be sure not to contact the potential juror at issue, for such contact could constitute a breach of an attorney's ethical obligations.⁵¹ As such, a prosecutor must be very careful to follow the ethical guidelines and to ascertain only the information necessary to determine biases of potential jurors.

Additionally, prospective jurors may claim a constitutional right to privacy that protects them from the disclosure of personal information during voir dire.⁵² Determining whether a prosecutor's questioning of a prospective juror's internet activity rises to a level sufficient to constitute an invasion of privacy will probably depend on the specific type of internet activity involved.⁵³

If the user chooses not to alter his or her default security settings on social media, the profile remains open to the public, available for all to view; and a prosecutor could access the information without infringing on a person's privacy

⁴⁸ By using an agent or investigator in a deceptive manner, an attorney engages in pretext. See *infra* Part II for a further discussion of the ethical concerns associated with social networking.

⁴⁹ See *infra* Part II (further discussing the ethical rules associated with a lawyer's use of social networking for investigation purposes).

⁵⁰ MODEL RULES OF PROF'L CONDUCT R. 3.5 (2010) ("A lawyer shall not seek to influence a . . . juror, [or] prospective juror . . . [or] communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order; . . ."); see, e.g., Robert S. Kelner & Gail S. Kelner, *Social Networks and Personal Injury Suits*, N.Y. L.J. (Sept. 24, 2009), <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202434026615> (examining the extent to which adversaries may invade a plaintiff's personal social networking site).

⁵¹ Ramasastry, *supra* note 39.

⁵² Michael R. Glover, *The Right to Privacy of Prospective Jurors During Voir Dire*, 70 CALIF. L. REV. 708, 711-12 (1982) (asserting that a citizen's obligation to serve on a jury in a criminal matter should not amount to a willing waiver of the expectation of privacy).

⁵³ McGee, *supra* note 34, at 319. Compare *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001) ("Users would logically lack a legitimate expectation of privacy in materials intended for publication or public posting."), with *United States v. Padilla-Valenzuela*, 896 F. Supp. 968, 972 (D. Ariz. 1995) ("To be meaningful, the right to privacy must preclude the offending questions from being asked of any prospective jurors.").

expectations.⁵⁴ Given the widespread publicity associated with social media and the general information-sharing nature of social networks, it would be difficult for an individual to assert a reasonable expectation of privacy.⁵⁵ The prosecutor must be wary in using such information though, because many people on the internet post information painting themselves as who they want to be as opposed to who they actually are.⁵⁶ The opinions expressed in the posting may not be an accurate reflection of the potential juror's character or actions.⁵⁷

Courtroom decorum may also play a role in voir dire. Some judges make their own courtroom rules, and some may require notice so that both sides have equal opportunity to research potential jurors.⁵⁸ As long as both prosecutors and defense lawyers have equal access to these social networking sites, however, most judges probably will not object.⁵⁹

Another possible concern with prosecutors accessing potential information is the use of taxpayer dollars to provide technological equipment in the courtroom, as many taxpayers have issues with spending public money on Wi-Fi accessibility and iPads or other tablets for prosecutorial use.⁶⁰ Fully equipping the courtroom with the necessary technology, however, may allow for greater success within the prosecution function.

⁵⁴ See *United States v. Maxwell*, 45 M.J. 406, 417-18 (C.A.A.F. 1996) (analogizing Internet activity to mailing a letter and finding that "the more open the method of transmission . . . the less privacy one can reasonably expect").

⁵⁵ Dianne M. Timm & Carolyn J. Duven, *Privacy and Social Networking Sites*, 124 NEW DIRECTIONS FOR STUDENT SERVS. 89, 92 (2008) (describing social networking websites as those designed to promote user-sharing information and created "to provide individuals with a means for communicating and interacting with one another").

⁵⁶ See generally Beth C. Boggs & Misty L. Edwards, *Does What Happens on Facebook Stay on Facebook? Discovery, Admissibility, Ethics, and Social Media*, 98 ILL. B.J. 366 (2010).

⁵⁷ *Id.*

⁵⁸ Campoy & Jones, *supra* note 35, at A2.

⁵⁹ Constable, *supra* note 38.

⁶⁰ See Martinez, *supra* note 37 (discussing objections of some Cameron County, Texas taxpayers for expenditures related to prosecutorial use of certain technology in the courtroom that could be used to invade privacy rights of potential jurors).

C. Discovery

Prosecutors and other attorneys can find a treasure trove of discoverable information on social networking websites to establish their cases. The law governing discovery of online personal information, however, is relatively murky, and only a handful of courts have directly addressed the issue.⁶¹ Frequently, a prosecutor will look to social networking websites specifically for information that will either corroborate or undermine a case.⁶² There are few cases dealing specifically with prosecutorial discovery issues, however, other civil cases can help illustrate issues similar to those prosecutors may encounter. Although discoverability of social media is still a new area of law, the majority of the courts addressing these issues have allowed discovery of relevant information posted to social networking websites.⁶³

In personal injury cases, for example, where the plaintiff places his or her health directly at issue, lawyers have been known to request information from social networking websites to use in assessing the issue of damages. In *Ledbetter v. Wal-Mart Stores, Inc.*, an electrical system shorted out, and two electricians were severely burned.⁶⁴ They brought suit for their injuries, and one wife brought a claim for loss of consortium.⁶⁵ During discovery, the defendant sent subpoenas to several social media accounts, and the plaintiffs asserted that items from their personal social media accounts should be protected under a marital privilege or doctor-patient privilege.⁶⁶ The court determined that because the plaintiffs put the confidential facts in

⁶¹ Boggs & Edwards, *supra* note 56, at 367 (citing Sean P. O'Donnell, *The Use of Information Posted on Facebook and MySpace in Litigation*, SUBROGATION & RECOVERY ALERT, Oct. 19, 2009, available at <http://www.cozen.com/cozendocs/outgoing/alerts/2009/subro101409.pdf>).

⁶² Boggs & Edwards, *supra* note 56, at 366.

⁶³ *Id.* at 367.

⁶⁴ *Ledbetter v. Wal-Mart Stores, Inc.*, No. 06-CV-01958-WYD-MJW, 2009 WL 1067018, at *1 (D. Colo. Apr. 21, 2009).

⁶⁵ *Id.*

⁶⁶ *Id.*

issue, the request was reasonably calculated to lead to the discovery of admissible evidence.⁶⁷

Conversely, in *T.V. v. Union Township Board of Education*, a New Jersey court reached the opposite conclusion.⁶⁸ In that particular case, a teenager was sexually assaulted by a fellow middle school student and claimed that the school failed to adequately supervise.⁶⁹ The court found that the information on the plaintiff's social networking website was protected because "the student's privacy interests prevailed, absent a particular showing of relevance."⁷⁰ Because the defense had not sufficiently shown why the messages were needed, the judge made a preliminary ruling that personal social networking pages were only discoverable if there is a particularized showing that the information is relevant, due to privacy concerns.⁷¹

Electronic social media presents criminal prosecutors and civil parties alike with potentially valuable opportunities for both evidence and discovery. In *Lenz v. Universal Music Corporation*, the Northern District Court of California determined, "When a client [uses social media and] reveals to a third party that something is 'what my lawyer thinks,' she cannot avoid discovery on the basis that the communication was confidential."⁷² Because the decision of *Lenz* has broad relevance in a public digital environment, communications by a party can run a serious risk of compromising the attorney-client privilege with respect to key

⁶⁷ *Id.* at *2; see also Evan Brown, *Court Allows Wal-Mart to Subpoena Facebook and Myspace*, INTERNET CASES (Apr. 26, 2009), <http://blog.internetcases.com/2009/04/26/court-allows-wal-mart-to-subpoena-facebook-and-myspace/>.

⁶⁸ Mary Pat Gallagher, *MySpace, Facebook Pages Called Key to Eating-Disorder Coverage Dispute*, N.J. L.J., Feb. 1, 2008, at 1, available at <http://www.law.com/jsp/article.jsp?id=1201779829458> (citing *T.V. v. Union Twp. Bd. of Educ.*, No. UNN-L-4479-04 (N.J. Super. Ct. Dec. 22, 2004)).

⁶⁹ *Id.*

⁷⁰ *Id.*; see also Henry Gottlieb, *MySpace, Facebook Privacy Limits Tested in Emotional Distress Suit*, N.J. L.J. (June 8, 2007), <http://www.law.com/jsp/law/international/LawArticleFriendlyIntl.jsp?id=900005555723> (recognizing the court in *T.V.* held, "Without a particularized showing that the [MySpace and Facebook] texts are relevant, the plaintiff's privacy interests prevail.").

⁷¹ Gallagher, *supra* note 68.

⁷² *Lenz v. Universal Music Corp.*, No. 5:07-CV-03783 JF (PVT), 2010 WL 4789099, at *5 (N.D. Cal. Nov. 17, 2010).

issues in a case.⁷³ Though courts are more reluctant to allow discovery of e-mail messages than an actual social network profile, several courts have allowed the discovery of social-media messages if they are relevant.⁷⁴

Additionally, prosecutors may utilize social networking to gather information from informants; especially since this information would not necessarily need to be disclosed at trial.⁷⁵ These rules may cause conflicts between the prosecutor and the defense, however, based on whether or not social media postings planned to be used at trial would constitute “reports, statements, or opinions . . . recorded or otherwise preserved, made in connection with the particular case” or “physical evidence and photographs relevant to the case” that would need to be disclosed.⁷⁶ Future courts evaluating these scenarios will have to consider whether any of the information discovered by a prosecutor could be considered “work product” and thus, privileged; or whether the information was freely discoverable as public information.

Another problem often encountered in prosecutors discovering information from social media, comes in a person’s inability to ever actually “delete” anything from the Internet.⁷⁷

⁷³ *Id.* at *4; *see also* United States v. Ebersole, 263 F. App’x 251, 253 n.4 (3d Cir. 2008) (noting defendant’s MySpace page was admitted into evidence); Michigan v. Liceaga, No. 280726, 2009 WL 186229, at *3-4 (Mich. Ct. App. Jan. 27, 2009) (holding the trial court did not erroneously admit evidence of MySpace photographs, which supported the State’s contention that the trial court properly found that the defendant committed second degree murder and was in possession of a firearm during the commission of a felony).

⁷⁴ Boggs & Edwards, *supra* note 56, at 368.

⁷⁵ *See* UNIF. R. CIR. CT. AND COUNTY CT. PRAC. R. 9.04(B)(2). This rule governs discovery and states:

Disclosure of an informant’s identity shall not be required unless the confidential informant is to be produced at a hearing or trial or a failure to disclose her/her identity will infringe the constitutional rights of the accused or unless the informant was or depicts himself or herself as an eyewitness to the event or events constituting the charge against the defendant.

Id.

⁷⁶ *Id.* R. 9.04(A)(4).

⁷⁷ Information posted on social media may be retained by Google’s online cache, even after the material is deleted. Brock Read & Jeffrey R. Young, *Facebook and Other Social-Networking Sites Raise Questions for Administrators*, CHRON. HIGHER EDUC., Aug. 4, 2006, at A29.

Information posted on social media websites, specifically social networks, is written in an addictively mesmerizing, permanent ink. Thus, prosecutors could use this permanency aspect of social media in their favor to uncover information to be used at trial. Social networking sites have become just another way that people say things or do things that come back to haunt them.⁷⁸ President Barack Obama reiterated the permanency aspect of social media and stated, "I want everybody . . . to be careful about what you post on Facebook, because in the YouTube age, whatever you do, it will be pulled up again later somewhere in your life."⁷⁹

Furthermore, the Library of Congress recently acquired the entire Twitter database.⁸⁰ The library received all public tweets from the 2006 inception of the service to present.⁸¹ As such, "tweets" may be seen as part of the public record and may be more easily used by prosecutors.

In the end, prosecutors must be careful because even if a court determines that information from a social networking site is discoverable, it may or may not be admissible, and it may or may not need to be disclosed pre-trial.⁸²

D. Evidence

The potential availability of helpful evidence on internet-based sources makes utilizing information from social networks an attractive new weapon in a prosecutor's arsenal of formal and informal discovery devices.⁸³ Not only can evidence from social-networking sites reveal personal communications, establish motives and personal relationships, and provide location information, but it can also prove and disprove alibis, and establish crime or criminal enterprise.⁸⁴ Prosecutors can use

⁷⁸ *Obama Warns U.S. Teens of Perils of Facebook*, REUTERS (Sept. 8, 2009, 4:55 PM), <http://www.reuters.com/article/idUSN0828582220090908>.

⁷⁹ *Id.*

⁸⁰ Matt Raymond, *Twitter Donates Entire Tweet Archive to Library of Congress*, LIBR. OF CONGRESS (Apr. 15, 2010), <http://www.loc.gov/today/pr/2010/10-081.html>.

⁸¹ *Id.*

⁸² Boggs & Edwards, *supra* note 56, at 369.

⁸³ See, e.g., *Bass ex rel. Bass v. Miss Porter's Sch.*, 3:08cv1807 (JBA), 2009 WL 3724968, at *1-2 (D. Conn. Oct. 27, 2009).

⁸⁴ U.S. DEP'T OF JUSTICE: COMPUTER CRIME & INTELLECTUAL PROP. SECTION, OBTAINING AND USING EVIDENCE FROM SOCIAL NETWORKING SITES: FACEBOOK,

information from social networking sites when presenting evidence at trial to determine how a judge or jury will perceive a particular witness.⁸⁵ It can be used to specifically attack the credibility of a character witness or to demonstrate elements of a particular crime.⁸⁶ For example, federal prosecutors in the case against the man charged in an Arizona shooting rampage targeting United States Representative Gabrielle Giffords may use a message posted on the man's MySpace page saying, "Goodbye friends," hours before the shooting.⁸⁷ With a few clicks of the mouse, prosecutors can cast doubt on a witness's character and motives.

Potentially relevant information can be discovered from users' wall posts, status updates, photos, and locations at particular times. Many people use social networking to post what they feel, what they think, or where they are at the time of a particular event; and as such, prosecutors are eager to access that information to later use against defendants. Information accessed from social media can be used to show physical health, similar to the way "day in the life" videos are used to counter claims of injury or disability.⁸⁸

In one specific case, a defense attorney used information she accessed online to dismiss the charges against her client.⁸⁹ The particular situation involved a forcible rape claim in Oregon, where a teenager told the police she would never willingly engage in intercourse.⁹⁰ The defense attorney viewed the "victim's"

MYSPACE, LINKEDIN, AND MORE (2010), available at https://www.eff.org/files/filenode/social_network/20100303_crim_socialnetworking.pdf.

⁸⁵ Boggs & Edwards, *supra* note 56, at 369.

⁸⁶ Joseph Goldstein, "On Tha Run for Robbin a Bank" and Other Online Postings That Investigators Love, N.Y. TIMES, Mar. 3, 2011, at A25.

⁸⁷ *Id.*; see, e.g., Doug Rule, *Police, Prosecutors Look for Evidence on Facebook, Twitter*, MOBILELIA (March 3, 2011, 1:51 PM), <http://www.mobiledia.com/news/83193.html>.

⁸⁸ See, e.g., *Leduc v. Roman*, 2009 CanLII 6838, *15 (Can. Ont. Sup. Ct. J.), available at <http://www.canlii.org/en/on/onsc/doc/2009/2009canlii6838/2009canlii6838.pdf> (finding that Facebook photos would be admissible for a personal injury suit involving a loss of enjoyment of life claim, when they contain relevant information about that party's lifestyle).

⁸⁹ Stephanie Francis Ward, *MySpace Discovery: Lawyers are Mining Social Networks for Nuggets of Evidence*, 93 A.B.A. J. 34 (2007), available at <http://www.abajournal.com/magazine/article/next>.

⁹⁰ *Id.*

MySpace page, where she talked about parties, drinking, and engaging in sexual activity, and posted provocative pictures of herself.⁹¹ Thus, based on what was posted, the attorney could see how the teenage “victim” would be perceived by jurors.⁹² The defense attorney called her as a witness, and ultimately, the charge against her client was dismissed.⁹³

Furthermore, prosecutors can evaluate a person’s associations and affiliations to perhaps boost a claim of discrimination or bias. One prosecutor used pictures of young men posing with guns posted on a social networking site to obtain a conviction of several gang members.⁹⁴ Most court decisions, thus far, indicate that if the information found is relevant, it will be admitted as evidence.

Prosecutors can even use information accessed from photos on social networks that are merely “tagged” to an individual, regardless of whether they posted the particular photos or not.⁹⁵ For instance, in the civil custody case of *Lalonde v. Lalonde*, the court awarded the father custody of the minor based on evidence that the child’s mother had been drinking—something her psychiatrists warned could adversely interfere with her medication.⁹⁶ There may be problems regarding the use of photos from social media sites in the future, however, as courts become less reliant on photos as authenticated evidence, especially given the ability to manipulate photographs with “Photoshop” or hack into another social networking account so easily.⁹⁷

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Facebook Thugs: Gun-toting Gangsters Jailed After Campaigner Collected Brazen Internet Poses*, DAILY MAIL REP. (Sept. 8, 2009), <http://www.dailymail.co.uk/news/article-1211722/Gun-toting-gang-members-jailed-named-shamed-Facebook.html#ixzz1K7hyAXfG>.

⁹⁵ Social networking users do not necessarily have to obtain another user’s permission or authorization to “tag” a photo. See *Facebook Photos*, FACEBOOK, <https://www.facebook.com/apps/application.php?id=2305272732&sk=info> (last visited Jan. 22, 2012). In fact, facial recognition software is frequently pre-installed on cameras to automatically recognize and “tag” individuals upon uploading the pictures to certain social networking websites. See *Lalonde v. Lalonde*, 2009-CA-002279-MR, 2011 WL 832465, at *2 (Ky. Ct. App. Feb. 25, 2011) (finding that permission is not necessary to “tag” a photo of a person on Facebook.).

⁹⁶ *Lalonde*, 2011 WL 832465, at *2.

⁹⁷ Goldstein, *supra* note 86, at A25.

E. Sentencing

After a prosecutor uses damaging information posted online as evidence to cast doubt on the character and motives of a defendant to obtain a conviction, a prosecutor can then use the information during sentencing hearings in order to argue for harsher punishment. Prosecutors frequently use Facebook and Twitter post-conviction to see if the defendant is truly remorseful, interested in reform or rehabilitation, and whether the defendant is empathetic toward the victim.⁹⁸

Prosecutors do not always immediately turn to social networking sites while preparing for sentencing, despite embarrassing photos of criminal defendants that are sometimes available in plain sight and accessible under a person's real name. As discussed in Part II, attorneys can encounter problems in authenticating whether a person actually posted the particular material and must follow ethical guidelines in pursuit of such information.⁹⁹ In circumstances where prosecutors have reason to suspect incriminating pictures online, or have been tipped off to a particular person's MySpace or Facebook page, however, the sites can produce critical character evidence. In one particular instance, a twenty-year-old young man, who just two weeks after he was charged in a drunken driving crash that seriously injured a woman, attended a Halloween party dressed as a prisoner.¹⁰⁰ Some of the party pictures depicted him in a black-and-white striped shirt and an orange jumpsuit costume labeled "Jail Bird."¹⁰¹ After someone posted the pictures on Facebook, the prosecutor offered them as convincing evidence during the drunken-driving case.¹⁰² The prosecutor used the pictures to portray the accused as an unrepentant young man more interested in drunkenly celebrating while his seriously-injured

⁹⁸ Ken Strutin, *The Role of Social Media in Sentencing Advocacy*, N.Y. L.J. (Sept. 29, 2010), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202472638649&The_Role_of_Social_Media_in_Sentencing_Advocacy&goback=.gde_2364615_member_30861667#.

⁹⁹ See *infra* Part II.

¹⁰⁰ *Social Networks Help Detectives Solve Crimes*, REDORBIT (July 19, 2008), http://www.redorbit.com/news/technology/1486314/social_networks_help_detectives_solve_crimes/.

¹⁰¹ *Id.*

¹⁰² *Id.*

victim recovered in the hospital.¹⁰³ A judge agreed with the prosecutor and called the pictures “depraved” in sentencing the young man to two years in prison.¹⁰⁴

This revolutionary implementation of social media, specifically social networking, also shows the increasing need for the establishment of new rules and guidelines within the court system and legal profession.¹⁰⁵ Therefore, as more courts interpret the impact of social media, prosecutors must be cautious in performing all of their legal obligations.

II. HAZARDS ASSOCIATED WITH USE OF SOCIAL MEDIA IN THE PROSECUTION FUNCTION

The prevalence of social networking websites and the potential benefits of accessing them to obtain evidence present ethical challenges for prosecutors attempting to navigate the virtual world. Even though information from social media websites may be both discoverable and admissible, ethical rules and guidelines can limit an attorney’s ability to freely access an individual’s social networking account.¹⁰⁶ Prosecutors must be reminded that all of their actions will be scrutinized; and therefore, it is essential that they abide by the Model Rules of Professional Conduct in all aspects of the profession. Specifically regarding social media, these rules govern the prosecutor’s personal social network postings, *ex parte* communications on social media, and even a prosecutor’s role in relation to the jury.

¹⁰³ *Id.*

¹⁰⁴ *Id.* Rhode Island Superior Court Judge Daniel Procaccini said the prosecutor’s presentation changed his sentencing decision. *Id.* He stated, “I did feel that gave me some indication of how that young man was feeling a short time after a near-fatal accident, that he thought it was appropriate to joke about and mock the possibility of going to prison.” *Id.*

¹⁰⁵ Many bar associations and ethics committees have recently started to reconsider rules that apply to lawyers in the virtual world. *See, e.g.*, Colo. B.A. Ethics Comm., Formal Op. 119 (2008); Ariz. B.A. Comm. on R. Prof’l Conduct, Formal Op. 09-04 (2009) (“[T]he Committee also recognizes that technology advances may make certain protective measures obsolete over time. . . . As technology advances occur, lawyers should periodically review security measures in place to ensure that they still reasonably protect the security and confidentiality of the clients’ documents and information.”); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-442 (2006); Md. B.A. Ethics Comm., Op. 2007-09 (2006).

¹⁰⁶ Boggs & Edwards *supra* note 56, at 369.

A. The Ethical Issues Associated with Prosecutorial Postings

Ethical issues may arise when prosecutors post comments on their own social media accounts. Because prosecutors are bound by professional codes of conduct, their freedom to vent, complain, and gripe is much more limited than that of the average citizen.¹⁰⁷ As an officer of the court, an attorney loses the full ability to criticize that court.¹⁰⁸ Thus, prosecutors must be prudent in posting information online related to an ongoing case, opposing counsel, judge, or jury.

For example, a Florida prosecutor faced discipline after his Facebook status updates resulted in a mistrial.¹⁰⁹ During the felony assault trial of a known gang member, the prosecutor unprofessionally made updates to the tune of the theme song from *Gilligan's Island*.¹¹⁰

Similarly, a Florida defense attorney—angry with a Fort Lauderdale judge for asking defendants whether they were ready for trial within only one week of their arraignment—decided to include his thoughts in his personal blog, calling the judge an “evil, unfair witch” and questioning the judge’s motives and competence in asserting that she was “seemingly mentally ill” and “clearly unfit for her position.”¹¹¹ In its conclusion that the

¹⁰⁷ John Schwartz, *A Legal Battle: Online Attitude vs. Rules of Bar*, N.Y. TIMES, Sept. 13, 2009, at A1.

¹⁰⁸ *Id.*

¹⁰⁹ Todd Wright, *Lawyer Marooned After “Gilligan’s Island” Facebook Poem: Lawyer’s Facebook Joke Goes Wrong*, NBC MIAMI (Apr. 22, 2010, 1:41 PM), <http://www.nbcmiami.com/news/weird/Lawyer-Marooned-After—Gilligans-Island-Facebook-Poem-91810124.html>.

¹¹⁰ Some of the post included:

Just sit right back and you’ll hear a tale, a tale of a fateful trial that started from this court in St. Lucie County. The lead prosecutor was a good woman, the 2nd chair was totally awesome. Six jurors were ready for trial that day for a four hour trial, a four hour trial.

The trial started easy enough [but] then became rough. The judge and jury confused, If not for the courage of the fearless prosecutors, the trial would be lost, the trial would be lost. The trial started Tuesday, continued til Wednesday and then Thursday With Robyn and Brandon too, the weasel face, the gang banger defendant, the Judge, clerk, and Ritzline here in St. Lucie.

Id.

¹¹¹ *Id.*; see, e.g., Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It’s Also Dangerous*, A.B.A.J.COM (Feb. 1, 2011, 4:20 A.M.),

attorney violated five different state ethics rules, including Rule 4-8.2(a), prohibiting attorneys from making false or reckless statements regarding the qualifications or integrity of a judge, and Rule 4-8.4(d), prohibiting engaging in professional conduct that is prejudicial to the administration of justice, the Florida Bar publicly reprimanded the attorney and imposed a \$1250 fine.¹¹²

In another instance, a lawyer in Illinois lost her job as an assistant public defender and violated legal ethics rules based on blog postings that belittled jurists, described clients, and revealed confidential client details.¹¹³

Additionally, a lawyer in San Diego was responsible for having a criminal conviction set aside and sent back to a lower court because of his blog posts while serving as a juror.¹¹⁴ During the trial, the attorney-juror posted details of the case on his personal blog.¹¹⁵ Because he failed to disclose his occupation during jury selection, and because of the blog posts, the attorney-juror received a forty-five-day suspension, paid \$14,000 in legal fees, and lost his job.

1. Competence and Diligence

Because the Model Rules require lawyers to be competent and diligent in their representation of clients, prosecutors may be obligated to develop specific knowledge related to social media use.¹¹⁶ For example, Rules 1.1 and 1.3 impose certain standards on attorneys regarding “keep[ing] abreast of changes in the law and its practice”¹¹⁷ This suggests that the duties of diligence and competence may necessarily include a duty to regularly monitor changes to the rules governing lawyers to stay up-to-date on advancements in aspects of the law related to technology, especially social media.

http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous/.

¹¹² *Id.*; see also Wright, *supra* note 109.

¹¹³ *Id.* Some of the “thinly veiled” case details included statements like, “This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because ‘he’s no snitch.’” Schwartz, *supra* note 107.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ MODEL RULES OF PROF’L CONDUCT R. 1.1, 1.3 (2010).

¹¹⁷ *Id.* R. 1.1 cmt. 6.

Furthermore, prosecutors must be diligent in monitoring not only what they post on their own social media themselves, but also what is posted by someone else and relates to their professional actions.¹¹⁸ Additionally, even more than simply monitoring their own online activities, attorneys should remind their clients that their online activities may be monitored by judges or opposing counsel which could result in adverse consequences.¹¹⁹ For example, one defendant in a personal injury case posted pictures of an active social life on Facebook which an opposing counsel later used against him.¹²⁰ Another client in a custody case made a post on a social networking site that she was single and had no children, and this information was used against her in court to illustrate her dishonesty.¹²¹

2. Statements to the Media

When a prosecutor's actions result in an egregious prosecutorial mistake, certain consequences must be faced. In order to avoid these conflicts, there are specific rules of professional conduct governing the prosecutor's statements made to the press, and these rules can be applied to statements made using social media.

The rule governing trial publicity, Rule 3.6(a), provides that "[a lawyer] shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding" ¹²²

In the modern age, a prosecutor should know the very nature of social media promotes information-sharing.¹²³ As such,

¹¹⁸ See, e.g., Margaret DiBianca, *Complex Ethical Issues of Social Media*, BENCHER (Nov. 2010), <http://www.innsofcourt.org/Content/Default.aspx?Id=5497>.

¹¹⁹ *Id.*

¹²⁰ Michael E. Getnick, *Social Media: The Good, the Bad, and the Ugly*, N.Y. ST. B.A. J., Oct. 2009, at 5 (discussing the negative impact the pictures posted had on the defense's contention that the defendant was responsible and professional).

¹²¹ *Id.*

¹²² MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2010).

¹²³ See Steven C. Bennett, *Look Who's Talking: Legal Implications of Twitter Social Networking Technology*, N.Y. ST. B.A. J., May 2009, at 11 (noting that "[t]he essential

statements made by prosecutors on social media, specifically social networking sites, could have a prejudicial effect on the proceeding if they involve statements related to: the character, credibility, reputation, or criminal record of a party, suspect, or identity of a witness;¹²⁴ the contents of any confession, admission, or statement given by a defendant or suspect, or that persons' refusal or failure to make a statement in a criminal case or proceeding;¹²⁵ the performance or results of any examination or test;¹²⁶ any opinion as to the guilt or innocence of a defendant;¹²⁷ information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial;¹²⁸ or the fact that a defendant has been charged with a crime, unless a statement explaining that a charge is merely an accusation, and an individual is presumed innocent until proven guilty is included.¹²⁹

Because any information posted on social media, specifically social networking accounts, would very easily be disseminated to a large number of people; prosecutors must be very careful in their social networking habits in order not to materially prejudice an ongoing proceeding by making statements regarding the information enumerated in Rule 3.6, Comment 5.

On the other hand, a prosecutor *can* make a general statement or posting on a social networking website *without elaboration* about the general nature of the claim or defense involved;¹³⁰ the information contained in a public record;¹³¹ information related to an investigation that is in progress, including the general scope of the investigation;¹³² the scheduling or result of any step in litigation;¹³³ or in a criminal case, the

purpose of Twitter . . . is to keep connected to friends . . ."); *see also supra* note 55 and accompanying text.

¹²⁴ MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 5(1) (2010).

¹²⁵ *Id.* R. 3.6 cmt. 5(2).

¹²⁶ *Id.* R. 3.6 cmt. 5(3).

¹²⁷ *Id.* R. 3.6 cmt. 5(4).

¹²⁸ *Id.* R. 3.6 cmt. 5(5).

¹²⁹ *Id.* R. 3.6 cmt. 5(6).

¹³⁰ *Id.* R. 3.6(b)(1) (emphasis added).

¹³¹ *Id.* R. 3.6(b)(2) (including tweets, *see supra* notes 80-81 and accompanying text).

¹³² *Id.* R. 3.6(b)(3).

¹³³ *Id.* R. 3.6(b)(4).

identity, residence, occupation, and family status of the accused;¹³⁴ information necessary to aid in apprehension of that person;¹³⁵ the fact, time, and place of arrest;¹³⁶ and the identity of investigating and arresting officers.¹³⁷ Thus, as long as a statement falls under one of these categories, prosecutors can safely post information on their personal social networking pages without fear of violating the professional rules of conduct.¹³⁸

3. Lack of Candor Toward the Tribunal

Model Rule of Professional Conduct 3.3, like many state bar association rules, prohibits lawyers from knowingly making a false statement of material fact to a tribunal.¹³⁹ Some judges report incidences where lawyers make statements in court that do not appear to align with their recent social media updates.

Sometimes, a prosecutor may even get caught in a fib, based on internet postings.¹⁴⁰ In one instance, a young lawyer requested a delay in a trial, citing a death in his family.¹⁴¹ After granting the delay, the judge checked the attorney's Facebook page and found more posts about partying than grief.¹⁴² Boldly enough, at the end of the first delay, the lawyer sought an additional one; which the judge quickly declined.¹⁴³

4. Confidentiality

Prosecutors could also face penalties for breaches of confidentiality related to their social networking habits. Model Rule of Professional Conduct 1.6, governing confidentiality of information states, "A lawyer shall not reveal information relating

¹³⁴ *Id.* R. 3.6(b)(7)(i).

¹³⁵ *Id.* R. 3.6(b)(7)(ii).

¹³⁶ *Id.* R. 3.6(b)(7)(iii).

¹³⁷ *Id.* R. 3.6(b)(7)(iv).

¹³⁸ When a prosecutor makes a statement in his or her official capacity, or on the district attorney's official social networking website, however, he or she may be opening themselves up to potential liability. *See supra* notes 12-24 and accompanying text; *infra* notes 168-86 and accompanying text.

¹³⁹ MODEL RULES OF PROF'L CONDUCT R. 3.3 (2010).

¹⁴⁰ Schwartz, *supra* note 107, at A1.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted”¹⁴⁴ Revealing privileged information about a client’s actions that are “embarrassing or detrimental” could be a violation of legal ethic rules protecting a client’s confidentiality.¹⁴⁵ Breaches of confidentiality can occur when a prosecutor posts information on his or her own social networking site or in communication made publicly between “profiles” of several “friends” or “followers” including clients.¹⁴⁶ Prosecutors must be careful though, because “even seemingly innocuous posts can reveal information.”¹⁴⁷ Ultimately, as long as the ethics rules are followed and clients’ privacy and confidentiality are safeguarded, prosecutors can embrace social media and enjoy all of its benefits.

5. Contacting a Represented or Unrepresented Party

Because the majority of jurisdictions have professional conduct rules governing contact with an opposing party if that party is represented by counsel, an invitation to become “friends” or a “follower” on a social networking site, and thus, an invitation to access personal information, could possibly be considered impermissible direct contact.¹⁴⁸ Rule 4.2 governs the communications of a lawyer and his agents with parties known to be represented by counsel and prohibits such communications unless the prior consent of the party’s lawyer is obtained or the conduct is authorized by law.¹⁴⁹ Therefore, if a lawyer attempted to “friend” a *represented* party in a pending litigation, then the lawyer’s conduct would be subject to Rule 4.2. If the lawyer attempted to “friend” an *unrepresented* party, however, the

¹⁴⁴ MODEL RULES OF PROF’L CONDUCT R. 1.6 (2010).

¹⁴⁵ Several state rules provide for a two-pronged standard which protects both information safe guarded by the attorney-client privilege, as well as information obtained in the professional relationship that “the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” *See, e.g.*, N.Y. CODE OF PROF’L RESPONSIBILITY DR 4-101 [1200.19]: Preservation of Confidences and Secrets of a Client.

¹⁴⁶ O’Brien, *supra* note 8, at 516.

¹⁴⁷ *Id.*

¹⁴⁸ Kelner & Kelner, *supra* note 50.

¹⁴⁹ MODEL RULES OF PROF’L CONDUCT R. 4.2 (2010).

lawyer's conduct would fall under Model Rule 4.3, which prohibits a lawyer from stating or implying that he or she is disinterested, requires the lawyer to correct any misunderstanding as to the lawyer's role, and prohibits the lawyer from giving legal advice other than the advice to secure counsel.¹⁵⁰

According to the Oregon State Bar Association, if information posted on a social media account is publicly accessible, an opposing attorney can access the posted data because it could be considered the same as "reading a magazine article . . . written by that adversary."¹⁵¹ Moreover, the attorney simply could be reading "information posted for general public consumption . . . not communicating with the represented owner of the Web site."¹⁵²

The situation would be different, however, if an attorney or her agent had to specifically interact with a represented party to be able to access the party's social media account.¹⁵³

6. Using Pretext to Obtain a Person's Information on a Social Networking Web Site

If an attorney uses deceptive tactics to access a social networking website, he or she may be in violation of state privacy and tort laws, as well as rules of professional conduct.¹⁵⁴ Deceptive tactics may include an attorney hiring an investigator to become "Facebook friends" with a non-party witness. For example, a recent Philadelphia Bar Association Professional Guidance Committee opinion recognized that it was unethical deception for an attorney to surreptitiously access a social networking profile page of any party involved in litigation.¹⁵⁵ The Philadelphia Bar Association found that it would violate ethics rules for an attorney or attorney's investigator to make a friend

¹⁵⁰ *Id.* at R. 4.3.

¹⁵¹ Or. B.A. Legal Ethics Comm., Formal Op. 2005-164 (2005); *see also* Seidenberg, *supra* note 111.

¹⁵² Or. B.A. Legal Ethics Comm., Formal Op. 2005-164 (2005).

¹⁵³ *Id.*

¹⁵⁴ Sean P. O'Donnell, *The Use of Information Posted on Facebook and MySpace in Litigation*, SUBROGATION & RECOVERY ALERT, Oct. 19, 2009, <http://www.cozen.com/cozendocs/outgoing/alerts/2009/subro101409.pdf>.

¹⁵⁵ Philadelphia B.A. Prof'l Guidance Comm., Formal Op. 2009-02, at 1 (2009), available at http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf.

request to an unrepresented person using his or her real name.¹⁵⁶ Specifically, the inquiring lawyer's intention to have a third party "friend" or "follow" the unrepresented witness implicated Rule 8.4(c).¹⁵⁷ The conduct also violated Rule 5.3(c)(1), which holds a lawyer responsible for the conduct of a non-lawyer employed by the lawyer if the lawyer directs, or with knowledge ratifies, conduct that would violate the rules if engaged in by the lawyer; and Rule 4.1, which prohibits a lawyer from making a false statement of fact or law to a third person.¹⁵⁸

Similarly, the Oregon State Bar Association determined that if a lawyer sought to "'friend' the enemy" who was represented by counsel to access the party's webpage, then this would constitute communication between the lawyer and opposing party in violation of Model Rule 4.2.¹⁵⁹

The New York State Bar Association found that because Facebook and MySpace sites are accessible to all members of the social network, the Rules of Professional Conduct would not be implicated.¹⁶⁰ The New York State Bar Association found that a lawyer who represents a client in a pending litigation, and who has access to the Facebook, MySpace, or other social network used by another party in litigation, may access and review the *public* social network pages of that party to search for potential impeachment material.¹⁶¹ As long as the lawyer did not "friend"

¹⁵⁶ *Id.* at 3.

¹⁵⁷ *Id.*; see also MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2010).

¹⁵⁸ Philadelphia B.A. Prof'l Guidance Comm., Formal Op. 2009-02, at 2 (2009). Specifically, the Committee determined that the proposed "friending" by a third party would constitute deception in violation of Rules 8.4 and 4.1, and would constitute a supervisory violation under Rule 5.3 because the third party would omit a material fact. See also MODEL RULES OF PROF'L CONDUCT R. 5.3 & 4.1 (2010).

¹⁵⁹ Or. B.A. Legal Ethics Comm., Formal Op. 2005-164 (2005); see Seidenberg, *supra* note 111.

¹⁶⁰ N.Y. State B.A. Comm. on Prof'l Ethics, Formal Op. 843 (2010). Note, one of several key distinctions between the scenarios discussed in the Philadelphia opinion and the New York State Bar opinion is that the Philadelphia opinion concerned an unrepresented *witness*, whereas the New York State opinion concerned a *party*. *Id.* at 2 n.1.

¹⁶¹ *Id.* at 3; see O'Donnell, *supra* note 154 ("Successful privacy violations require the plaintiff demonstrate he or she had a subjective expectation of privacy at the time of the invasion. Proof of this expectation is difficult to demonstrate, because 'the inherent nature of the profile . . . works against any notion of an expectation of privacy.' Accordingly, there is a presumption that an individual who posts information to a

the other party or direct a third person to do so, accessing the social network website of the party would not violate Rule 8.4, Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by non-lawyers acting at their direction), or Rule 4.1.¹⁶²

On the other hand, the Bar Association of the City of New York Committee on Professional and Judicial Ethics determined that an attorney can withhold strategic information when making a friend request and “may use her real name and profile to send a ‘friend request’ to obtain information from an unrepresented person’s social networking website without also disclosing the reasons for making the request.”¹⁶³ The committee determined that “a lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence.”¹⁶⁴

Few other committees have dealt with the implications associated with social media and Rules 4.2 and 4.3. Therefore, as more and more prosecutors turn to social networks for trial purposes, the need for clearer standards and ethical guidelines will only increase.

7. Spoliation of Evidence

If a prosecutor or other attorney were able to ethically discover relevant information to a case online, the Rules of Professional Conduct govern the preservation of that information. Specifically, Model Rule 3.4(a) prohibits lawyers from unlawfully altering or destroying evidence and from assisting others from doing so.¹⁶⁵ Thus, lawyers have an ethical duty to preserve electronic evidence, including information discovered on social networks.¹⁶⁶ Failure to preserve such information could result in serious sanctions. For example, if an attorney instructs his client

social networking website does not have a reasonable expectation of privacy in the information he or she posts.”).

¹⁶² N.Y. State B.A. Comm. on Prof'l Ethics, Formal Op. 843 (2010).

¹⁶³ *Id.*; see, e.g., B.A. of City of N.Y. Comm. on Prof'l & Jud. Ethics, Formal Op. 2010-2 (2010).

¹⁶⁴ B.A. of City of N.Y. Comm. on Prof'l & Jud. Ethics, Formal Op. 2010-2, at 4 (2010).

¹⁶⁵ MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2010).

¹⁶⁶ DiBianca, *supra* note 118.

to delete evidence online, it may constitute spoliation of evidence, which could result in an adverse inference instruction to a jury or sanctions.¹⁶⁷

8. Impact on an Ongoing Trial

A prosecutor may also be subject to repercussions for impermissibly contacting judges, jurors, opposing counsel, parties, or witnesses via social media.¹⁶⁸ According to Model Rule of Professional Conduct 3.5, which governs impartiality and decorum of the tribunal, a prosecutor must maintain proper deference and respect in the courtroom and must not engage in *ex parte* communications.¹⁶⁹ Furthermore, Model Rule 8.4 prohibits a lawyer from engaging in conduct that involves dishonesty, fraud, deceit, or misrepresentation.¹⁷⁰ Thus, attorneys must be careful to abide by the Rules of Professional Conduct, even outside of the courtroom, because those actions can have a detrimental effect on an ongoing trial.

There are several recent examples of social media use that interfered with legal proceedings. In North Carolina, a judge was reprimanded for “friending” a defense lawyer in an ongoing child support and custody case, for posting and reading messages discussing the trial, and accessing information about the opposing party.¹⁷¹ Even while the case was still proceeding, the judge and defendant’s attorney posted messages regarding the case on their individual Facebook pages; and since they had become “friends,” each could view the content on the other’s page.¹⁷² For instance,

¹⁶⁷ *Id.*

¹⁶⁸ Note, too, that judges may be subject to rules regarding online conduct as well. *See infra* notes 171-86 and accompanying text.

¹⁶⁹ MODEL RULES OF PROF’L CONDUCT R. 3.5 (2010) (“A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official . . . (b) communicate *ex parte* with such a person . . . unless authorized to so by law or court order; (c) communicate with a juror or perspective juror after discharge of the jury . . . or (d) engage in conduct intended to disrupt a tribunal.”).

¹⁷⁰ *Id.* R. 8.4.

¹⁷¹ Debra Cassens Weiss, *Judge Reprimanded for Friending Lawyer and Googling Litigant*, A.B.A.J.COM (June 1, 2009, 6:20 AM), www.abajournal.com/news/judge_reprimanded_for_friending_lawyer_and_googling_litigant; *see also In re Terry*, No. 08-234, N.C. Jud. Standards Comm’n (Apr. 1, 2009), *available at* <http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf>.

¹⁷² *Terry*, No. 08-234, N.C. Jud. Standards Comm’n, at 1.

the defense attorney's post asked, "How do I prove a negative?" in reference to the issue of whether his client had engaged in an extramarital affair.¹⁷³ The judge later posted that he had "two good parents to choose from" and felt "that he will be back in court," leaving the impression that the case was not settled.¹⁷⁴ Soon after, the defense attorney posted, "I have a wise judge."¹⁷⁵ The Judicial Standards Commission found these actions to be in violation of ethical rules prohibiting impartiality and decorum of the tribunal, because they could be considered conduct prejudicial to the administration of justice.¹⁷⁶ Additionally, the attorney involved in the social media relationship could face ethics charges under Model Rule of Professional Conduct 8.4(f), which forbids a lawyer from knowingly assisting a judge in behavior that violates the rules of judicial conduct.¹⁷⁷

In addition to prosecutors and other attorneys, judges must also use caution online, because their social media habits could also have an effect on a trial. For example, Chief Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit was investigated for off-color humor that, although not intended to be public, was accessible on his family's web server.¹⁷⁸ Although he was officially cleared of wrongdoing, a three-judge panel admonished him for not safeguarding the website, which they found "judicially imprudent."¹⁷⁹

Additionally, ethics opinions disagree on whether a judge can "friend" or "follow" an attorney on a social media account if the attorney might appear before the particular judge in court.¹⁸⁰ The Florida Supreme Court's Judicial Ethics Advisory Committee issued an opinion holding that it is judicial misconduct for a judge to add lawyers who may appear before that judge as "friends" on

¹⁷³ *Id.* at 2.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*; see also Seidenberg, *supra* note 111.

¹⁷⁶ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.5 (2010); N.C. CODE OF JUDICIAL CONDUCT CANON 2A (2006) (governing failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary).

¹⁷⁷ Seidenberg, *supra* note 111; see also MODEL RULES OF PROF'L CONDUCT R. 8.4(f) (2010).

¹⁷⁸ Schwartz, *supra* note 107, at A1.

¹⁷⁹ *Id.*

¹⁸⁰ Seidenberg, *supra* note 111.

Facebook or other online social networks.¹⁸¹ The committee commented that listing lawyers who might appear before the judge as “friends” on a judge’s social networking site would reasonably convey to others the impression that these lawyer “friends” are in a special position to influence the judge.¹⁸²

On the other hand, bar associations from Kentucky, New York, and South Carolina take a different approach. Judicial ethics authorities in those states have opined that “friending” or “following” someone on online social networks does not necessarily imply a special connection to those Internet friends.¹⁸³ The Ethics Committee of the Kentucky Judiciary explained:

[T]he committee’s view is that the designation of a ‘friend’ on a social networking site does not, in and of itself, indicate the degree or intensity of a judge’s relationship with the person who is the “friend.” The committee conceives such terms as “friend,” “fan” and “follower” to be terms of art used by the site, not the ordinary sense of those words.¹⁸⁴

The state bar associations did offer one caveat and warned that a judge must carefully consider whether, in any particular case, the judge’s social media connections with an attorney—whether alone or in combination with other facts—rise to the level of a “close social relationship.”¹⁸⁵ Because if such a relationship exists, the judge must disclose it to opposing counsel or recuse himself from the case or both.¹⁸⁶

B. Prosecutorial Immunity

Prosecutors may face consequences for actions related to their social networking including sanctions, public reprimands,

¹⁸¹ Fla. S. Ct. Jud. Ethics Advisory Comm., Op. 2009-20 (2009).

¹⁸² *Id.*; see also VA. CODE OF JUD. CONDUCT, Canon 2B (1999). According to the Florida opinion, the online communication would violate Canon 2B of the state’s Code of Judicial Conduct, which is similar to Rule 2.4(c) of the ABA Model Code of Judicial Conduct. Moreover, such an online friendship would violate state judicial Canon 5A—akin to ABA Model Code Rule 3.1(c)—by casting “reasonable doubt on the judge’s capacity to act impartially.” Seidenberg, *supra* note 111.

¹⁸³ Seidenberg, *supra* note 111.

¹⁸⁴ Ethics Comm. of Ky. Judiciary, Formal Jud. Ethics Op., JE-119 (2010).

¹⁸⁵ Seidenberg, *supra* note 111.

¹⁸⁶ *Id.*

overturned convictions, potential disbarment, or even civil suits. Because of these potential repercussions, a prosecutor may try to claim immunity to deflect the possibility of lawsuits. Generally speaking, a prosecutor is entitled to absolute immunity if his or her actions fall within the prosecutorial function; if those actions occur outside of the prosecutorial function, however, a prosecutor may only have qualified immunity.¹⁸⁷ Several cases help to explain this distinction.

In *Imbler v. Pachtman*, the Supreme Court concluded that a prosecutor enjoys absolute immunity in actions which involve initiating and presenting a prosecution.¹⁸⁸ Thus, the prosecutor has absolute immunity against section 1983 actions arising out of his or her actions as a prosecutor.¹⁸⁹ Accordingly, if a prosecutor makes statements on his or her social networking page related to the *initiation* or *presentation* of the case, just as if he or she made the statements from the courthouse steps, then they would be shielded from suits under absolute immunity.¹⁹⁰ The *Imbler* Court's policy explanation of protecting prosecutors from constant threats of litigation also applies to a modern prosecutor's use of social media in relation to their professional duties.¹⁹¹ Additionally, if the prosecutor were subject to liability constantly, he or she would be deprived of the benefits social media offers to

¹⁸⁷ See *infra* notes 188-206 and accompanying text.

¹⁸⁸ 424 U.S. 409 (1976).

¹⁸⁹ *Id.* Frequently, prosecutors may be subjected to 42 U.S.C. § 1983 suits claiming a violation of the right to a fair trial. According to *Imbler*, however, as long as the prosecutor remains within the function of the prosecutor's duties, he or she will be immune. *Id.* at 427.

¹⁹⁰ *Id.* at 430-31.

¹⁹¹ *Id.* at 424-26.

If a prosecutor has only a qualified immunity, the threat of section 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. . . . The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency. . . . [Further, the prosecutor's] energy and attention would be diverted from the pressing duty of enforcing the criminal law.

Id. at 424-25.

both the prosecutor individually and the community he or she serves.¹⁹²

The Supreme Court addressed the question of absolute prosecutorial immunity fifteen years later in *Burns v. Reed*.¹⁹³ In determining that the prosecutor cannot be absolutely immune when performing *all* functions of the office, the Court did not define the line between the protected adversarial functions and the semi-protected investigatory or administrative functions.¹⁹⁴ As such, prosecutors looking to *Burns* may have difficulty understanding the immunity standards and the dividing line of what is considered protected when using it for press relations or when mining social media for evidence.

In *Buckley v. Fitzsimmons*, the Supreme Court reaffirmed the distinction between the advocacy function and investigatory function of the prosecutor and determined that because the prosecutors' actions were investigatory in nature, they were not entitled to absolute immunity.¹⁹⁵ The *Buckley* Court concluded, "When the functions of prosecutors and detectives are the same . . . the immunity that protects them is also the same."¹⁹⁶ Because of this reasoning, prosecutors may claim that they should be entitled to the same protection as police departments when it comes to social networking; and therefore, should be able to post the same or similar information without opening themselves up to liability.

¹⁹² See *supra* notes 12-24 and accompanying text. The *Imbler* decision did not determine that the prosecutor was absolutely immune for all activities, noting that prosecutors can have investigative duties similar to those of police and other law enforcement, which would fall under a qualified immunity standard. *Id.* at 430. This notion was discussed later in *Burns v. Reed*, 500 U.S. 478, 495 (1991).

¹⁹³ 500 U.S. 478 (1991). The Court considered whether the prosecutor was immune when giving legal advice to police regarding the legality of their investigation and whether the prosecutor had immunity when participating in the probable cause hearing. *Id.* at 495.

¹⁹⁴ *Id.* at 491-92, 494-95.

¹⁹⁵ 509 U.S. 259, 272 (1993). *Buckley* illustrated the two primary functions of the prosecutor. *Id.* First, there is an investigatory function, in which the prosecutor works with local police to evaluate the case to determine whether to charge someone with a crime. *Id.* Second, after making the decision to prosecute, a prosecutor functions as an advocate. *Id.* Because of the conflicting duties, a prosecutor is not entitled to absolute immunity until there is probable cause. *Id.* Accordingly, "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* at 274.

¹⁹⁶ *Id.* at 276.

The *Buckley* Court also evaluated immunity of prosecutors in making statements to the media.¹⁹⁷ The Court determined that because “[t]he conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state’s case in court, or actions preparatory for these functions,” prosecutor’s statements to the press were not entitled to absolute immunity.¹⁹⁸ As such, modern prosecutors may face challenges under the *Buckley* reasoning, in determining whether statements made on social media would be considered statements to the press and whether they would be protected.¹⁹⁹ Until courts evaluate this conflict to fully determine whether social networking can be considered another form of communication a prosecutor may use within the prosecution function, prosecutors must proceed with caution.

There are many other cases involving media statements by prosecutors. For instance, in *Martin v. Merola*, six plaintiffs brought action under section 1983 alleging that their right to a fair trial had been infringed by the district attorney, when the prosecutor announced the arrest of the plaintiffs to the press with the assertion that they were linked directly to mafia crime families.²⁰⁰ The Second Circuit determined that while the statements to the press may have breached professional responsibility rules, they did not amount to a deprivation of rights under the Constitution.²⁰¹ In *Marrero v. City of Hialeah*, the Fifth Circuit held that making statements outside of the courtroom was beyond the protection of absolute immunity.²⁰² In elaborating, the Court noted:

[W]hen a prosecutor steps outside the confines of the judicial setting, the checks and safeguards inherent in the judicial

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 278.

¹⁹⁹ As opposed to the *Imbler* line of thought. See *supra* note 190 and accompanying text.

²⁰⁰ 532 F.2d 191, 193-94 (2d Cir. 1976). In his concurring opinion, Judge Lumbard further stated that prosecutorial immunity would not “protect the prosecutor against responsibility for his acts when they are clearly beyond the proper exercise of his authority and exceed any possible construction of the power granted to his office . . .” *Id.* at 195 (Lumbard, J., concurring).

²⁰¹ *Id.*

²⁰² 625 F.2d 499, 509 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981).

process do not accompany him, and thus there is greater need for private actions to curb prosecutorial abuse No surveillance comparable to that of a judge serves to check a prosecutor's zeal when he makes statements about individuals outside the courtroom or when he engages in investigative activities . . . in obtaining evidence.²⁰³

Based on this line of cases, if a prosecutor can be found to have "shopped" for evidence on social networking websites, he or she may not be entitled to absolute immunity.²⁰⁴ The prosecutor may be subject to civil suits for invading constitutional rights of individuals,²⁰⁵ and complaints for violating professional rules of conduct.²⁰⁶ Furthermore, the prosecutor must be careful in making statements using social media, as serious immunity concerns may arise involving whether the posting was made inside or outside of the courtroom.

These decisions reiterate the importance of discretion in prosecutorial postings. Because statements made on social media may not be entitled to absolute immunity, prosecutors must strive to be professional in all aspects of their lives, including their virtual ones.

C. Juror Misconduct

Technology is obviously changing the courtroom experience. Along with judges and lawyers, jurors have been known to undermine cases in using social media and other internet sites to conduct research and communicate outside of the courtroom.²⁰⁷ As modern jurors engage in such internet-related misconduct, courts nationwide are forced to declare mistrials, wasting both time and

²⁰³ *Id.* at 509.

²⁰⁴ See, e.g., *Kalina v. Fletcher*, 522 U.S. 118, 118-19 (1997) (evaluating whether a prosecutor may be held liable for conduct in obtaining an arrest warrant and determining that a prosecutor is not protected by absolute immunity when acting as a complaining witness).

²⁰⁵ For example, with certain privacy settings, prosecutors may be accused of violating privacy rights. See *supra* notes 48-57 and accompanying text.

²⁰⁶ See *supra* notes 108-67 and accompanying text.

²⁰⁷ See Vesna Jaksic, *A New Headache for Courts: Blogging Jurors*, 29 NAT'L L.J. 2007, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1174035813248>.

taxpayer money.²⁰⁸ Prosecutors must take additional efforts to educate jurors about the dangerous impact social media can have on an ongoing trial.

Because jurors have been known to seek suggestions from social networking sites on how to vote, tweet about the perceived guilt or innocence of the accused, and even investigate crime scenes using Google Earth; many courts have had to address the issue of whether juror access to extraneous information on the Internet supports a motion for a new trial.²⁰⁹

In *Wilgus v. F/V Sirius, Inc.*, a juror in Maine contacted the plaintiff's attorney after trial, inquiring whether he knew his client advocated binge drinking and drug use, based on information he learned from Facebook.²¹⁰ Although the court questioned both the juror and the jury foreperson, the motion for a new trial based on juror misconduct was denied because the juror was adamant that he conducted the research after the trial; and the jury foreperson stated there was no mention of the Facebook page during deliberations.²¹¹

A Michigan court fined a juror \$250 for posting on her social networking site, during the middle of the trial, that she thought the defendant in the case was guilty.²¹² In addition, the judge ordered the juror to write an essay on the right to a fair trial.²¹³

On the other hand, in a Florida federal drug case, federal prosecutors spent two years developing their arguments against doctors, pharmacists, and businessmen who were operating an illegal internet pharmacy network.²¹⁴ After seven weeks of trial, a juror admitted to the judge that he had been conducting research

²⁰⁸ McGee, *supra* note 34, at 302.

²⁰⁹ Jonathan Berr, *Why Facebook, Twitter and Jurors Don't Mix*, DAILYFINANCE (Sept. 12, 2010), <http://www.dailyfinance.com/2010/09/12/why-facebook-twitter-and-jurors-don't-mix/>.

²¹⁰ 665 F. Supp. 2d 23, 24 (D. Me. 2009).

²¹¹ *Id.* at 27-28.

²¹² Berr, *supra* note 209.

²¹³ *Id.*

²¹⁴ Deirdra Funcheon, *Jurors and Prosecutors Sink a Federal Case Against Internet Pharmacies*, BROWARD-PALM BEACH NEW TIMES (Apr. 23, 2009), <http://www.browardpalmbeach.com/2009-04-23/news/jurors-and-prosecutors-sink-a-federal-case-against-internet-pharmacies> (discussing *United States v. Hernandez*, No. 07-60027-CR, 2007 WL 2915856 (S.D. Fla. Oct. 4, 2007)).

about the case online.²¹⁵ After the judge questioned the remaining jurors, and discovered eight other jurors had been engaging in similar conduct, the judge was forced to declare a mistrial.²¹⁶

Similarly, the attorney for the Mayor of Baltimore, Maryland sought a mistrial in the mayor's conviction for embezzlement.²¹⁷ In that case, five of the jurors became "Facebook friends" and chatted on the social networking site, while the trial was ongoing, despite orders not to communicate with each other outside of the jury room.²¹⁸ There, the mayor's attorney asserted that the "Facebook friends" became a clique that altered jury dynamics.²¹⁹

During a civil trial in Arkansas involving a building products company, one juror used his personal Twitter account to send related updates and messages during the trial.²²⁰ The juror's messages included, "oh and nobody buy [that company's products]. It's bad mojo and they'll probably cease to exist, now that their wallet is 12m lighter and so . . . , what did you do today? Oh nothing really, I just gave away TWELVE MILLION DOLLARS of somebody else's money."²²¹ Although the juror maintained that he had not posted any messages relating to the substance of the case, counsel for the building products company asked the court to overturn the multi-million dollar judgment, which the court later denied.²²²

All of these scenarios show the importance of judges and attorneys, specifically prosecutors, taking the time to discuss with jurors the magnitude of refraining from posting anything outside

²¹⁵ *Id.*

²¹⁶ John Schwartz, *As Jurors Turn to Google and Twitter, Mistrials are Popping Up*, N.Y. TIMES, Mar. 18, 2009, at A1. The other jurors had been conducting Google searches on the lawyers and the defendant, looking up news articles about the case, checking definitions on Wikipedia and searching for evidence that had been specifically excluded by the judge. *Id.*

²¹⁷ See Andrea F. Siegel, *Judges Confounded by Jury's Access to Cyberspace*, BALTIMORE SUN (Dec. 13, 2009), http://articles.baltimoresun.com/2009-12-13/news/bal-md.ar.tmi13dec13_1_deliberations-period-florida-drug-case-jurors; see also Weiss, *supra* note 171.

²¹⁸ Siegel, *supra* note 217.

²¹⁹ *Id.* Ultimately, the mayor's conviction was upheld. *Id.*

²²⁰ Schwartz, *supra* note 216.

²²¹ McGee, *supra* note 34, at 308-09 (internal quotation marks omitted); see also Christopher Danzig, *Mobile Misdeeds: Jurors with Handheld Web Access Cause Trials to Unravel*, INSIDE COUNSEL, June 1, 2009, at 38.

²²² McGee, *supra* note 34, at 308-09.

of the courtroom in order to ensure a fair trial and to avoid mistrials. Based on the statistics of people using social media, it is vital for judges and prosecutors to set clear standards for jurors, because the chances of having a jury consist of people without having access to social media are slim.²²³ Moreover, jurors must understand the gravity of their actions, as they can be subject to contempt charges.²²⁴ Courts are now facing "Blackberry-addicted jurors who [feel that] a simple trip to the grocery store can compel an Internet update."²²⁵ These examples also illustrate the serious delay that can be caused in the judicial system by juror misconduct, preventing efficiency and justice.

Clear guidelines and rules must be established in order to preserve the court system in today's society. The Judicial Conference recently released guidelines for federal judges in issuing new jury instructions to spell out clearly at the onset of trials that jurors must not communicate "through email, Blackberry, iPhone, text messages, or on Twitter, through any blog or website, through any Internet chat room, or by way of any other social networking websites, including Facebook, MySpace, LinkedIn and YouTube."²²⁶ Likewise, prosecutors must understand the importance of explaining the critical role of the jury before a trial begins.²²⁷ Part of the prosecutor's role as an elected official is to ensure efficiency in the cases tried. As an administrator in the justice system, prosecutors have both an individual interest and an official obligation to the legal profession to help develop the necessary guidelines for social media use in the courtroom. As prominent members of the legal profession, prosecutors must be willing to take the lead to ensure that each person involved in a trial is aware of the possible consequences of his or her online actions. By establishing clear guidelines and

²²³ See *supra* notes 1-10 and accompanying text.

²²⁴ McGee, *supra* note 34, at 319.

²²⁵ McGee, *supra* note 34, at 309-10; see, e.g., Ahnalese Rushmann, *Courtroom Coverage in 140 Characters*, 33 NEWS MEDIA & L. 28 (2009).

²²⁶ Denise Zamore, *Can Social Media Be Banned from Playing a Role in Our Judiciary?* A.B.A. LITIGATION NEWS, http://apps.americanbar.org/litigation/litigationnews/practice_areas/minority-jury-social-media.html (last visited Jan., 22, 2012).

²²⁷ Shane Read, *A Prosecutor's Role*, AMERICA.GOV (July 1, 2009), <http://www.america.gov/st/usg-english/2009/July/20090706174555ebypassedo0.8992731.html>.

developing a better standard for social media use, prosecutors can take the reasonable steps necessary to not only avoid dismissed cases, mistrials, and wrongful convictions, but also to continue to promote honesty and efficiency in both the prosecutorial profession and the judicial process.

CONCLUSION

Courts across the country may encounter many more technology-based problems in the future, especially as younger generations—more adept at social networking—emerge in a profession governed by centuries of legal tradition. Prosecutors utilizing social media to campaign for office, research potential jurors, or discover incriminating information for evidence must understand the nature and consequences of their actions.

It is essential to educate attorneys about the potential ethical ramifications involved in their use of social media and to establish clear standards and guidelines for the profession to help prevent future ethical violations. Until more bar association ethics committees and courts decide the issue of social media use in the legal profession, however, prosecutors must be aware of the potential ways the professional rules of conduct govern all actions of the profession, specifically the prosecution function, and the consequences they may face as a result of social networking.

Moreover, attorneys, specifically prosecutors, must be aware of the impact their actions will have on others involved in the judicial process. As leaders of the legal profession, prosecutors have an obligation to help develop the standards necessary to avoid dismissals, mistrials, and wrongful convictions, and ultimately, to ensure that justice prevails. Part of this obligation may very well include the duty to develop guidelines for the legal profession regarding courtroom social media.

In establishing clear boundaries for utilizing information that is readily available in modern society, courts will be able to still respect the long-established legal concepts of our nation's history, and embrace the technological advancements of the modern world that can positively impact the legal profession.

Kathryn Kinnison Van Namen

COMMENT

JUSTICE GINSBURG'S *BOARD OF EDUCATION V. EARLS* DISSENT: CONSTITUTIONAL TEACHING PRINCIPLES FOR KIDS

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INTRODUCTION

In *Board of Education v. Earls*,¹ the Supreme Court further extended its decision in *Vernonia School District 47J v. Acton*² by

¹ 536 U.S. 822 (2002).

holding that the suspicionless drug testing of students participating in extracurricular activities is per se constitutional. The Court's reasoning centered on the existence of "special needs" within the public school context, a broad and somewhat nebulous concept grounded in a "reasonability based on the circumstances" analysis.³ By distinguishing between the dire need for administrative control present in *Vernonia*⁴ and the less than pressing considerations set forth in *Earls*,⁵ Justice Ginsburg's dissenting opinion delineates an appropriate balance between the "special needs" of adequate drug control and the constitutional protections guaranteed to students based on considerations of efficacy and privacy. When viewed in light of subsequent cases and current research regarding the adequacy of random suspicionless drug testing, Ginsburg's dissent represents a voice of reason in response to a shout of panic among contemporary school administrators. In refusing to relinquish the framers' original intentions for the Fourth Amendment with her unique "middle way" jurisprudence,⁶ Ginsburg's dissent follows closely the oft-

² 515 U.S. 646 (1995) (holding that the suspicionless drug testing of athletes was constitutional).

³ *Earls*, 536 U.S. at 828; see also Jacob L. Brooks, Note, *Suspicionless Drug Testing of Students Participating in Non-athletic Competitive School Activities: Are All Students Next?* Board of Education v. *Earls*, 536 U.S. 822 (2002), 4 WYO. L. REV. 365, 395 (2004) ("In short, with respect to public schools, every significant provision in the Fourth Amendment has been abrogated by the nebulous 'special needs' doctrine that now exists just because schools are responsible for their students, not because a real problem may exist or special risks may be present.").

⁴ See *infra* notes 35-38 and accompanying text.

⁵ See *infra* note 107 and accompanying text.

⁶ Laura Krugman Ray, *Justice Ginsburg and the Middle Way*, 68 BROOK. L. REV. 629, 636 (2003) (analyzing Ginsburg's jurisprudential preference for "judicial moderation and gradualism"). Ray further noted:

Although Ginsburg's regard for precedent is flexible enough to accommodate change as well as variation, she tends to prefer incremental rather than dramatic transformations of the law and to require substantial support for significant doctrinal developments. Thus, it is not surprising that she has dissented when she thinks that the majority is striking out unwisely in a new direction.

Id. at 658; see generally Christopher Slobogin, *Justice Ginsburg's Gradualism in Criminal Procedure*, 70 OHIO ST. L.J. 867, 867 (2009) ("Justice Ruth Bader Ginsburg's preference for narrow rulings that adhere closely to precedent and that avoid grand pronouncements is well-known.").

cited principle that “students [do not] shed their constitutional rights . . . at the schoolhouse gate.”⁷

I. BRIDGING THE GAP: INDIVIDUALIZED SUSPICION TO THE SPECIAL NEEDS DOCTRINE

When interpreting the Fourth Amendment and expounding its proper application, heavy emphasis is often placed on the framers’ original intentions for the amendment.⁸ Our founding fathers had a strong interest in drafting an amendment that would protect against arbitrary and capricious searches based upon unwarranted suspicion.⁹ In pre-revolutionary America, the practice of granting general search authority to customs officers has been stated by several scholars as the primary motivation for the framers’ drafting of the Fourth Amendment.¹⁰ Such authority was often granted through “writs of assistance,”¹¹ which were

⁷ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

⁸ See, e.g., *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999) (holding that the first step in determining whether a governmental action violates the Fourth Amendment is to inquire whether the action would have been an unlawful search and seizure under the common law at the time the Amendment was framed); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (stating that while the “underlying command of the Fourth Amendment is always that searches and seizures be reasonable,” the effort to give meaning to the term can often “be guided by the meaning ascribed to it by the Framers of the Amendment” (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985)). But see Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 972-73 (2002) (suggesting that the Court should “stop discussing the historical origins of the Fourth Amendment” due to the Court’s inconsistent use of the Amendment’s historical framework and its selective distortion of such framework to compliment the Court’s modern view of reasonableness).

⁹ See THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 518 (2008) (“An aversion to suspicionless searches and seizures was the prime motivation of the Framers of the Fourth Amendment.”).

¹⁰ See, e.g., *Id.* at 40; JACOB B. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 19, 30 (1966); ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868*, at 25 (2006).

¹¹ Writs of assistance were a form of a general search warrant issued on the English crown’s own authority to search and seize prior to the 1660s and later pursuant to English legislation enabling customs searches and seizures adopted in 1662. CLANCY, *supra* note 9, at 27-30. Such writs “were akin to ‘permanent search warrants placed in the hands of custom officials: they might be used with unlimited discretion and were valid for . . . the life of the sovereign.’” *Id.* at 30 (quoting LANDYNSKI, *supra* note 10, at 31).

authorized by English statute and enabled customs searches and seizures virtually "anywhere the searcher desired to look."¹² The repeated abuse of virtually limitless searches and seizures lacking individualized suspicion "produced widespread resistance"¹³ in the American colonies and was an impetus for the events that led to the revolution.¹⁴ It is within this historical framework and amongst the original framers' concerns of prohibitions against general search and seizure warrants that the Fourth Amendment was promulgated.¹⁵

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁶

The Supreme Court's original interpretation of the Fourth Amendment was "predicated on property law concepts."¹⁷ As such, Fourth Amendment protection would not attach unless the object sought to be protected fell into one of the pronounced categories of "persons, houses, papers, and effects."¹⁸ However, the Supreme

¹² *Id.* at 30 (citing TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS 26 (1969)).

¹³ *Id.* at 31.

¹⁴ *Id.* at 34 & n.65.

¹⁵ See *Terry v. Ohio*, 392 U.S. 1, 37 (1968) (Douglas, J., dissenting):

The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion.

Id. (quoting *Henry v. United States*, 361 U.S. 98, 100 (1959)).

¹⁶ U.S. CONST. amend. IV.

¹⁷ Madeline A. Herdrich, Note, *California v. Greenwood: The Trashing of Privacy*, 38 AM. U. L. REV. 993, 999 (1989) (citing *Boyd v. United States*, 116 U.S. 616, 638 (1886), which held that a search and seizure was unreasonable when it involved a trespass to an individual's property rights that were superior to that of the government's).

¹⁸ See *Olmstead v. United States*, 277 U.S. 438, 457, 466 (1928) (limiting Fourth Amendment protections to physical intrusions upon the tangible objects of houses, persons, papers, and effects).

Court later abandoned this property-based approach in *Katz v. United States*.¹⁹ *Katz* shifted the focus of Fourth Amendment jurisprudence from a literal interpretation of the Fourth Amendment based upon property rights to one premised upon a "reasonable expectation of privacy."²⁰ The doctrinal shift in *Katz* has subsequently become the primary measure by which the Court determines whether an individual's privacy interest is protected under the Fourth Amendment.

The constitutionality of a Fourth Amendment search hinges upon its "reasonableness"²¹ and ordinarily requires "some quantum of individualized suspicion."²² The Court uses a variety of legal tools and "models" of interpretation to decide whether a search and seizure will be deemed reasonable.²³ Thus, whether a search will be deemed reasonable under the Court's Fourth Amendment jurisprudence is often difficult to predict.²⁴ Although reasonableness generally requires probable cause and a warrant in instances where police officers undertake a search to discover evidence, "a warrant is not required to establish the reasonableness of *all* government searches."²⁵ In certain instances, a search unsupported by probable cause may be constitutional if "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement

¹⁹ *Katz v. United States*, 389 U.S. 347, 352-53 (1967).

²⁰ *Id.* at 360 (Harlan, J., concurring); *see also* *Warden v. Hayden*, 387 U.S. 294, 300-02 (1967) (rejecting the Court's previously established Fourth Amendment analysis of property rights established in *Boyd* and *Olmstead*). The origin of premising Fourth Amendment jurisprudence on an expectation of privacy rights that are deemed "reasonable" can be found in the seminal *Harvard Law Review* article, Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

²¹ U.S. CONST. amend. IV.; *see also* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) ("[T]he ultimate measure of the constitutionality of a governmental search is 'reasonableness.'").

²² *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976).

²³ *See, e.g.*, CLANCY, *supra* note 9, at 469-515 (organizing the Court's different approaches to reasonableness into a non-exhaustive list of five principal models: the warrant preference model; the individualized suspicion model; the totality of the circumstances test; the balancing test; and a hybrid model balancing test giving dispositive weight to the common law).

²⁴ *Id.* at 469 (acknowledging the Supreme Court's "ever changing treatment of reasonableness").

²⁵ *Vernonia*, 515 U.S. at 653.

impracticable.”²⁶ Within the context of the “special needs” doctrine, the Court dispenses with both the warrant and probable cause requirement and uses a balancing test to determine the reasonableness of a given search or seizure.²⁷

In the landmark case of *New Jersey v. T.L.O.*,²⁸ the Court held that obtaining a warrant and probable cause was unnecessary in the public school context because it “would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.”²⁹ In *T.L.O.*, the Court upheld a school administrator’s warrantless search of a student’s purse as constitutional because it was based upon reasonable suspicion.³⁰ The Court reasoned that “[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we [will] not hesitat[e] to adopt such a standard.”³¹ In departing from its previous adherence to the Fourth Amendment’s probable cause and a warrant requirement, the Court held that “special needs” were inherent in the public school environment and that the legality of the search of a student “depend[s] simply on the reasonableness, under all the circumstances, of the search.”³² The

²⁶ *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (Blackmun, J., concurring) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (holding that the warrantless search of a probationer’s home was valid because the “special needs” inherent in Wisconsin’s probation system made the warrant and probable-cause requirement impracticable).

²⁷ See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 828-29 (2002); *Vernonia*, 515 U.S. at 653; *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 677 (1989) (holding that the suspicionless testing of federal customs agents was reasonable given the special need of the government in preventing the promotion of drug users to governmental positions involving the interdiction of illegal drugs); *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 628, 634 (1989) (upholding the random suspicionless drug testing of railroad employees due to the government’s special need in avoiding the “disastrous consequences” that can result from even a momentary lapse of attention from a railway employee using drugs).

²⁸ 469 U.S. 325 (1985).

²⁹ *Id.* at 340.

³⁰ *Id.* at 347-48.

³¹ *Id.* at 341 (alteration to original). However, while the Court in *T.L.O.* dismissed the probable cause requirement, it was hesitant to address whether a standard of individualized suspicion should always be necessary in schools to meet the standard of reasonableness set forth in the Fourth Amendment. *Id.* at 342 n.8.

³² *Id.* at 341.

term “special needs” was coined in Justice Blackmun’s concurring opinion in *T.L.O.*, in which Blackmun cautioned that “[o]nly in those *exceptional circumstances* [of] special needs . . . is a court entitled to substitute its balancing of interests for that of the framers.”³³

In summary, the “special needs” doctrine in the public school context provides a standard with which the Supreme Court is able to bypass the framers’ heavy deference to individualized suspicion when a legitimate “special need” presents itself in the form of a strong governmental interest that the Court determines cannot be effectuated without a diminishment of student rights. It is against this background that the “special needs” balancing test of *Earls* should be construed.

II. SETTING THE STAGE: *VERNONIA SCHOOL DISTRICT 47J V. ACTON*

In the fall of 1989, the Vernonia School District implemented a drug-testing program known as the “Student Athlete Drug Policy” with the purpose of preventing student athletes from using drugs in order to protect their health and safety.³⁴ While drugs had not historically been a major problem for the Vernonia School District, teachers and school administrators had “observed a sharp increase in drug use” in the years prior to implementation of the policy.³⁵ By the 1988-1989 school year, “the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported in the early 1980’s,” and it was noted that the students had become increasingly rude and disruptive.³⁶ Among the student population, the school’s athletes were leaders of the prevailing drug culture that precipitated many of the school’s disciplinary problems.³⁷ This led to a concern among the district’s administrators of an increase in sports-related injuries among

³³ *Id.* at 351 (Blackmun, J., concurring) (emphasis added).

³⁴ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 650 (1995).

³⁵ *Id.* at 648.

³⁶ *Id.* at 649. In particular, students began to talk openly of their attraction to the drug culture and the school’s inability to address it. *Id.* at 648.

³⁷ *Id.* at 649.

athlete drug users, prompting the passage of the student testing policy.³⁸

Under the policy set forth by Vernonia, students desiring to participate in athletics would need to consent to the drug testing and obtain written consent from their parents.³⁹ Participants would be tested at the beginning of each season in addition to a "random pool" weekly throughout the season.⁴⁰ The drug testing itself would be done by an adult monitor of the same sex, who would stand approximately twelve to fifteen feet from the student while he/she produced the sample and listened for sounds of normal urination.⁴¹ The samples were checked for tampering and sent to an independent laboratory to test for amphetamines, cocaine, and marijuana.⁴² The laboratory was not given the identity of the students being tested, and the results were mailed to the superintendent or released to district personnel by telephone after the requesting official recited a confirmation code.⁴³

James Acton, a seventh grader, brought suit challenging Vernonia's policy on the grounds that it violated the Fourth and Fourteenth Amendments.⁴⁴ Stating its finding in *T.L.O.* that

³⁸ *Id.* The high school football and wrestling coach witnessed a severe sternum injury due to wrestling, and several omissions of safety procedures and missed executions by football players, all of which he attributed to be the effects of drug use. *Id.*

³⁹ *Id.* at 650. Students were also required to disclose any prescription medications they were taking. *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* While males were required to produce a sample at a urinal with the monitor waiting twelve to fifteen feet from them, females were required to produce the sample in an enclosed bathroom stall with the monitor outside listening for the normal sounds of urination. *Id.*

⁴² *Id.*

⁴³ *Id.* at 651. If a student tested positive, they would be subsequently tested as soon as possible to confirm the result. Upon a further positive testing, the athlete's parents were notified, and the school principal met with the student's parents to address the situation. The student was then given the option of either participating for six weeks in an assistance program that included weekly urinalysis, or suffering a suspension from athletics for the remainder of their current athletic season and the next. The student would then be retested prior to the start of the following athletic season for which he or she would be eligible. A second offense while on the assistance program resulted in the suspension of the athlete for the remainder of the year and the next athletic season, and a third offense in either scenario resulted in suspension for the remainder of the student's current athletic season and the following two athletic seasons. *Id.*

⁴⁴ *Id.*

special needs inhere in the public school context,⁴⁵ the Supreme Court upheld the constitutionality of the drug testing policy by employing a reasonableness-based balancing test consisting of three factors.⁴⁶ Within the first prong of the balancing test, the Court considered the nature of the privacy interest the search intruded upon.⁴⁷ The Court reasoned that the Fourth Amendment only protects “those [privacy interests] that society recognizes as ‘legitimate,’”⁴⁸ and that whether an expectation of privacy can be deemed legitimate will depend both on the context of the privacy interest and the individual’s legal relationship with the state.⁴⁹ Hinging its argument on school administrators standing *in loco parentis* over the children entrusted to them, the Court found that “students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.”⁵⁰

Under the second prong of the balancing test, the Court examined the character of the intrusion caused by the search.⁵¹ The Court recognized collecting urine samples infringed upon “an excretory function traditionally shielded by great privacy,”⁵² but likened the conditions to those encountered in public restrooms finding little intrusiveness in the actual collection of the urine sample.⁵³ The Court also considered the intrusiveness of the information that would be disclosed concerning the state of the

⁴⁵ *Id.* at 653; *see also supra* text accompanying notes 32-33.

⁴⁶ *Id.* at 654-65.

⁴⁷ *Id.* at 654.

⁴⁸ *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985)).

⁴⁹ *Id.*

⁵⁰ *Id.* at 655-57. The Court concluded that in addition to students having a lesser expectation of privacy than members of the general population:

Legitimate privacy expectations are *even less* with regard to student athletes. School sports are not for the bashful. They require “suiting up” before each practice or event, and showering and changing afterwards. Public school locker rooms . . . are not notable for the privacy they afford. . . . [T]here is an element of communal undress inherent in athletic participation. . . . By choosing to “go out for the team,” [athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.

Id. at 657 (emphasis added) (internal citation omitted) (internal quotation marks omitted).

⁵¹ *Id.* at 658.

⁵² *Id.* (quoting *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 626 (1989)).

⁵³ *Id.*

student's body and found it significant the tests looked only for illegal drug use, and the results would be released to a very limited group of school personnel.⁵⁴ Further, the test results would not be handed over to law enforcement authorities nor used for any additional disciplinary measures.⁵⁵ The Court thus found the invasion of privacy in the particular instance was not significant.⁵⁶

The Court then turned to the third prong of the balancing test and considered the "nature and immediacy of the governmental concern" and the "efficacy of [the] means for meeting it."⁵⁷ The Court noted that in previous drug-testing cases, such as *Skinner* and *Von Raab*,⁵⁸ it held the government interest motivating the search was compelling,⁵⁹ and that in the instance of deterring drug abuse by America's schoolchildren there was an equally compelling interest.⁶⁰ The Court reiterated that the *Vernonia* program was narrowly directed to drug use by school athletes,⁶¹ and the efficacy of the means was clearly addressed by

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 660.

⁵⁷ *Id.*

⁵⁸ *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 677 (1989) (holding that the suspicionless testing of federal customs agents was reasonable given the special need of the government in preventing the promotion of drug users to governmental positions involving the interdiction of illegal drugs); *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 628, 634 (1989) (upholding the random suspicionless drug testing of railroad employees due to the government's special need in avoiding the "disastrous consequences" that can result from even a momentary lapse of attention from a railway employee using drugs).

⁵⁹ *Vernonia*, 515 U.S. at 660. Scalia's majority opinion was careful to distinguish that a "compelling state interest" was not a "fixed, minimum quantum of governmental concern," but that in the Fourth Amendment context the phrase instead considers whether the interest "appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy." *Id.* at 661.

⁶⁰ *Id.* at 661 ("Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs . . .").

⁶¹ *Id.* at 662 ("Finally, it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm . . . is particularly high . . . the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes.).

"making sure that athletes do not use drugs," as this would curb the "role model' effect of [the] athletes' drug use."⁶²

The Court was also careful to address the respondents' argument that a drug testing policy based on individualized suspicion would be equally efficient in reaching the means while less intrusive.⁶³ The Court responded by repeating its assertion in *Skinner* that the least intrusive search is not a necessity for the search to be deemed reasonable, and that a drug test regime based on individualized suspicion would entail substantial difficulties "if it . . . indeed [was] practicable at all."⁶⁴ The Court concluded that, taking into account all the factors considered, Vernonia's drug testing policy was reasonable "and hence constitutional."⁶⁵ Justice Ginsburg joined in the holding but, in a brief concurrence, noted that she "comprehend[ed] the Court's opinion as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school."⁶⁶

III. MAJORITY OPINION OF *BOARD OF EDUCATION V. EARLS*

In 2002 the Supreme Court again visited the constitutionality of suspicionless based drug testing in public schools.⁶⁷ On September 14, 1998, the Board of Education of Independent School District No. 92 of Pottawatomie County adopted a "Student Drug Testing Policy," which required all students who participated in competitive extracurricular activities

⁶² *Id.* at 663.

⁶³ *Id.*

⁶⁴ *Id.* Of the substantial difficulties associated with individualized drug testing, the Court mentions: concerns that parents would be more unwilling to accept accusatory drug testing for all students which would transform the process into a "badge of shame"; risks that teachers will impose testing arbitrarily upon troublesome but not drug-likely students; concerns that such a policy will generate expensive lawsuits that charge the testing as arbitrary or simply demand greater process before testing is imposed; and the burden it will add to the "ever-expanding diversionary duties of schoolteachers." *Id.* at 663-64.

⁶⁵ *Id.* at 664-65.

⁶⁶ *Id.* at 666 (Ginsburg, J., concurring).

⁶⁷ *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

to submit to suspicionless drug testing.⁶⁸ To qualify for participation, students would have to consent to drug testing prior and throughout the time they engaged in extracurricular activities and could also be tested based upon individualized suspicion. The policy mandated that students who refused to submit to drug testing would be barred from participation.⁶⁹ Plaintiff Lindsey Earls⁷⁰ brought suit challenging the provisions of the policy which required the suspicionless drug testing of students participating in *non-athletic* competitive activities.⁷¹ Earls alleged the policy violated the Fourth Amendment and that the school district had failed to identify a special need for testing students who participate in extracurricular activities.⁷²

Relying on the holding of *Vernonia School District 47J v. Acton*,⁷³ the United States District Court for the Western District of Oklahoma rejected respondents' claim that the policy was unconstitutional and held that the Pottawatomie School District had demonstrated a special need to justify the warrantless and suspicionless drug testing of all students involved in competitive extracurricular activities.⁷⁴ The Tenth Circuit reversed the district court's ruling, holding that the Pottawatomie School District had failed to demonstrate that an identifiable drug problem existed among Tecumseh High School students.⁷⁵ The Tenth Circuit reasoned that before imposing a suspicionless drug

⁶⁸ Earls v. Bd. of Educ., 115 F. Supp. 2d 1281, 1282-83 (W.D. Okla. 2000). The "Policy" provided that "any student . . . represent[ing] Tecumseh Schools in any extracurricular activity . . . [would] be barred from participating in such activities unless the student submit[ed] a written consent to drug testing. *Id.* (internal quotation marks omitted).

⁶⁹ *Id.* at 1283. The drug test itself would only recognize "amphetamines, cannabinoid metabolites (marijuana), cocaine, opiates, barbiturates and benzodiazepines," though based on reasonable suspicion the student could also be tested for anabolic steroids and alcohol. *Id.* at 1283 & n.3.

⁷⁰ Earls, 536 U.S. at 826. At the time of the suit, Lindsay Earls, a Tecumseh High School student, was a member of the show choir, the marching band, the academic team, and the National Honor Society. *Id.*

⁷¹ *Id.* at 826-27. The plaintiffs did not challenge the suspicionless drug testing of athletes, nor did they challenge drug testing upon reasonable, individualized suspicion. *Id.* at 827 n.2.

⁷² *Id.* at 827.

⁷³ See *supra* notes 46, 64 and accompanying text.

⁷⁴ Earls v. Bd. of Educ., 115 F. Supp. 2d 1281, 1296 (W.D. Okla. 2000).

⁷⁵ Earls v. Bd. of Educ., 242 F.3d 1264, 1278 (10th Cir. 2001).

testing program a school "must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem."⁷⁶

Justice Thomas delivered the majority opinion in *Earls*, where once again the "special needs" balancing test was used to determine Fourth Amendment constitutionality.⁷⁷ Under the privacy interest allegedly compromised, the Court once more relied heavily on the government's responsibilities both as a "guardian and tutor" of the schoolchildren, defining the question of the reasonableness of the intrusion as "whether [it would be] one that a reasonable guardian and tutor might undertake."⁷⁸ In countering the respondents' argument that students not involved with athletics have a greater expectation of privacy than the athletes of *Vernonia*,⁷⁹ the majority reasoned that the distinction was not essential to their previous holding, which was ultimately rooted in the school's "custodial responsibility and authority."⁸⁰ All students affected by the policy thus had a limited expectation of privacy.⁸¹

Under its analysis of the intrusiveness of the policy, the majority in *Earls* analogized the Pottawatomie policy to that of *Vernonia*⁸² in that it was administered in an almost identical fashion save that the male students were allowed to produce their samples behind a closed stall.⁸³ The results of the tests were kept equally confidential and disclosed only on a "need to know" basis and were not used for law enforcement or disciplinary purposes.⁸⁴

⁷⁶ *Id.* The Tenth Circuit noted that it was "unclear from a simple reading of *Vernonia* . . . whether the Court's finding of a special need was based upon the school setting alone . . . or whether it was based upon that need in conjunction with the documented serious drug problem at the Vernonia schools." *Id.* at 1271 n.6.

⁷⁷ *See Earls*, 536 U.S. at 825.

⁷⁸ *Id.* at 830 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995)).

⁷⁹ *See supra* note 50.

⁸⁰ *Earls*, 536 U.S. at 831. The Court further reasoned that those students involved in extracurricular activities subjected themselves to many of the same intrusions on privacy as athletes, listing occasional off-campus travel and communal undress, individual rules and requirements that do not apply to the student body as a whole, and the general regulation of extracurricular activities as a whole. *Id.* at 831-32.

⁸¹ *Id.* at 832.

⁸² *See supra* notes 41-42 and accompanying text.

⁸³ *Earls*, 536 U.S. at 832-33.

⁸⁴ *Id.* at 833.

Further, the procedures and penalties for a failed drug test were similar to those in *Vernonia*.⁸⁵ The Court concluded that the invasion of student privacy was not significant given the minimal intrusion resulting from sample collection and limited uses to which the results were put.⁸⁶

In determining the nature and immediacy of the government's concerns and the efficacy of the policy, the Court focused on the importance of preventing drug use by America's schoolchildren. Listing episodes of potential drug use, two instances in which drug paraphernalia were found on campus, and the school board president's testimony that people were calling to discuss the "drug situation,"⁸⁷ the majority found a sufficient

⁸⁵ *Id.* at 833-34 ("After the first positive test, the school contacts the student's parent or guardian for a meeting. The student may continue to participate in the activity if within five days of the meeting the student shows proof of receiving drug counseling and submits to a second drug test in two weeks. For the second positive test, the student is suspended from participation in all extracurricular activities for 14 days, must complete four hours of substance abuse counseling, and must submit to monthly drug tests. Only after a third positive test will the student be suspended from participating in any extracurricular activity for the remainder of the school year, or 88 school days, whichever is longer."); see also *supra* note 43 (recounting *Vernonia*'s penalties for positive drug tests).

⁸⁶ *Earls*, 536 U.S. at 834.

⁸⁷ *Id.* at 834-35. The Tenth Circuit found the factual evidence in *Earls* to be unconvincing, noting that much of district's alleged drug use were instances that occurred in the 1970s, were based upon hearsay, or were virtually anecdotal. See *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1272-74 (10th Cir. 2001). The Tenth Circuit discussed several of the assertions made by the school district's board president, particularly her claim of fourteen instances of drug usage. The board president provided the following information to the court: (1) in 1970, the president's daughter told her an unidentified boy on a school bus offered her some pills; (2) in 1972 or 1973, her daughter told her that the boyfriend of the girl with whom she shared a locker sold drugs; (3) in 1978, one of her son's unidentified friends on the football team left a bag with drug paraphernalia at her house; (4) in 1979, her son told her of parties where marijuana was smoked; (5) in the mid-1980s, a meter reader found marijuana near the school's meter; (6) in the 1980s, her grandson told her an unidentified student possessed marijuana at school; (7) in the 1990s, her grandson told her he attended a party where his friend's girlfriend found her mother's marijuana and passed it around; (8) in the 1997-1998 school year, her granddaughter told her a boy was "bombed out"; and (9) an instance in the same school year in which a student not involved in extracurricular activities was found to have had marijuana in his car. *Id.* at 1274 & n.9. The Tenth Circuit further noted that the claimed "injuries to students and members of the public" involved an incident in 1990 or 1991 in which a steer got loose from a student "under the influence of some substance," then injuring the student and one other person. *Id.* at 1274 (internal quotations marks omitted).

showing of a "special need" was present.⁸⁸ Explicitly overruling the test articulated by the Tenth Circuit,⁸⁹ the majority held that it had never required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing.⁹⁰

While it admitted safety concerns of non-athletes' drug use, as opposed to the potential immediate physical injuries of athletes' drug use, did factor into the "special needs" analysis, the Court held that the safety interest furthered by drug testing is undoubtedly substantial for all schoolchildren involved in extracurricular activities.⁹¹ The majority lastly dismissed the notion that a drug testing system based upon individualized suspicion would be less intrusive,⁹² citing reasons similar to those listed in *Vernonia*,⁹³ and concluded that the testing of students involved in extracurricular activities was an effective means of addressing the school district's interest in deterring drugs and the policy was hence constitutional.⁹⁴

IV. GINSBURG'S DISSENT

"The particular testing program upheld today is not reasonable; it is capricious, even perverse: Petitioners' policy targets for testing a student population *least likely* to be at risk from illicit drugs and their damaging effects. I therefore dissent."⁹⁵

Justice Ginsburg's primary attack on the *Earls* majority was factual in nature and distinguished between the "disruptive and explosive drug abuse problem" in *Vernonia* and the scant evidence presented in *Earls*.⁹⁶ In retort to the majority's argument that the

⁸⁸ *Earls*, 536 U.S. at 835 ("[A] demonstrated problem of drug abuse . . . [is] not in all cases necessary to the validity of a testing regime,' but . . . some showing does 'shore up an assertion of special need for a suspicionless general search program.'" (alterations to original) (citing *Chandler v. Miller*, 520 U.S. 305, 319 (1997))).

⁸⁹ See *supra* text accompanying note 76.

⁹⁰ *Earls*, 536 U.S. at 836.

⁹¹ *Id.* at 836-37 ("We know all too well that drug use carries a variety of health risks for children, including death from overdose.").

⁹² *Id.* at 837; see also *id.* at 841-42 (Breyer, J., concurring).

⁹³ See *supra* note 64.

⁹⁴ *Earls*, 536 U.S. at 837-38.

⁹⁵ *Id.* at 843 (Ginsburg, J., dissenting) (emphasis added).

⁹⁶ *Id.* at 844-45.

holding in *Vernonia* was primarily based upon school administrators acting *in loco parentis*,⁹⁷ Ginsburg began her dissent by noting the majority's strong emphasis in *Vernonia* "that drug use increase[d] the risk of sports-related injur[ies] and that Vernonia's athletes were the leaders" of a school "drug culture that had reached epidemic proportions."⁹⁸ Citing the majority for its emphasis,⁹⁹ Ginsburg reiterated that the risk described in the *Vernonia* opinion was "immediate," as opposed to the "nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas" that she facetiously used to contrast the lack of immediate physical harm from non-athletic extracurricular activities.¹⁰⁰ Thus, in keeping with her preference for narrow rulings that closely adhere to precedent,¹⁰¹ Ginsburg concluded at the offset of her dissent that while "special needs inhere in the public school context, [they] are not so expansive or malleable as to render reasonable any program of student drug testing a school district elects to install."¹⁰²

Ginsburg's next attack centered on the majority's analysis of the diminished expectation of privacy among students involved in non-sporting extracurricular activities. Though the majority pointed to the voluntary nature of extracurricular activities as being sufficient to warrant a diminished expectation of privacy through additional regulations and rules not subject to the general student populace,¹⁰³ Ginsburg described such a comparison as "enlightening."¹⁰⁴ Noting that participation in extracurricular activities is not only a key component of school life but essential in the college admissions process, she questioned whether such participation can really be deemed "voluntary."¹⁰⁵ The dissent

⁹⁷ See *supra* note 78 and accompanying text.

⁹⁸ *Earls*, 536 U.S. at 843 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 649 (1995)) (internal quotation marks omitted).

⁹⁹ *Id.* at 845; see *supra* notes 61, 62 and accompanying text.

¹⁰⁰ *Id.* at 851-52.

¹⁰¹ See *supra* note 6.

¹⁰² *Earls*, 536 U.S. at 843 (citation omitted) (internal quotation marks omitted).

¹⁰³ *Id.* at 845.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 845-46. This argument is particularly responsive to Justice Breyer's concurrence, in which he elaborated that the testing program "preserves an option for the conscientious objector," who in turn "can refuse testing while paying a price

further opined that participation in athletics itself has a “distinctly different dimension” to that of other extracurricular activities by nature of its common communal undress and the exposure to “physical risks [which] schools have a duty to mitigate.”¹⁰⁶ Ginsburg concluded that to elect to participate in school activities alone was, while relevant to a discussion of reasonableness, insufficient to justify a suspicionless search.¹⁰⁷

Her dissent then addressed the majority’s analysis of the character of the intrusion. Ginsburg noted the majority’s failure to address that Earls provided instances of personal information, including students’ prescription drug use, being routinely viewed by Earls’ choir teacher without a “need to know.”¹⁰⁸ Earls also alleged the teacher left the files in an unsealed and unlocked location, accessible to other students.¹⁰⁹ Further, other evidence indicated the results were hardly given out on a “need to know” basis but instead were given out to all activity sponsors.¹¹⁰ Ginsburg stated it should not be assumed the confidentiality provisions of the policy would be upheld when there is factual evidence to the contrary, and thus the invasion of student privacy may not be negligible in all circumstances.¹¹¹

In analyzing the last factor of the “special needs” balancing test—the nature and immediacy of the governmental concern—Ginsburg returned once again to the factual disparity between *Earls* and *Vernonia*.¹¹² She compared the state of rebellion by a large segment of the student body in Vernonia, led by students participating in athletics, to Tecumseh’s annual reports to the government, which stated that drugs were present but “ha[d] not

(nonparticipation) that is serious, but less severe than expulsion from school.” *Id.* at 841 (Breyer, J., concurring).

¹⁰⁶ *Id.* at 846 (Ginsburg, J., dissenting). Ginsburg further mentioned that interscholastic athletics are more closely monitored in safety and health regulations than activities such as band or choir, and that such a reasoning gave credence to the argument in *Vernonia* that analogized programs of competitive athletics as similar to “adults who choose to participate in a closely regulated industry,” in which privacy is inherently “intimately affected.” *Id.* (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995)).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 848.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 849.

¹¹² *Id.*

identified themselves as major problems at this time.”¹¹³ Ginsburg argued that in such a circumstance the efficacy of any such suspicionless program would be greatly diminished.¹¹⁴ She further distinguished the majority’s reliance on *Von Raab* and *Skinner*, elucidating that in those cases tests were installed “to avoid enormous risks to the lives and limbs of others, not dominantly in response to the health risks to users invariably present in any case of drug use.”¹¹⁵

Ginsburg also illustrated why the immediacy of the concern was so lacking in *Earls* as compared to *Vernonia*. Citing subsequent case law that confirmed *Vernonia* was premised upon the immediate physical harms that could result from student athletes engaged in athletic activities while on drugs,¹¹⁶ Ginsburg contrasted the lack of immediate physical risk in other competitive extracurricular activities and noted that any ill effects from drug use in such activities would likely be equally present for any student.¹¹⁷ As to the efficacy of the drug testing policy in *Earls*, Ginsburg noted that “[t]here is a difference between imperfect tailoring and no tailoring at all.”¹¹⁸ She countered the majority’s well-reasoned proposition that students might be deterred from drug use in order to preserve their extracurricular eligibility by arguing it would be equally likely that students more apt to be involved with drugs may forgo extracurricular activity to avoid detection of their drug use.¹¹⁹ Ginsburg closed her arguments as to the factors of the “special needs” balancing test by reasoning that “Tecumseh’s policy thus falls short doubly if deterrence is its aim: It invades the privacy of students who need

¹¹³ *Id.*

¹¹⁴ *Id.* at 850 (quoting *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1277 (10th Cir. 2001)).

¹¹⁵ *Id.* (citing *Nat’l Treasury Emp. Union v. Von Raab*, 489 U.S. 656, 674 (1989)).

¹¹⁶ *Id.* (citing *Chandler v. Miller*, 520 U.S. 305, 317 (1997), for the proposition that in *Vernonia* the Court “emphasized the importance of deterring drug use by schoolchildren and the risk of injury a drug-using student athlete cast on himself and those engaged with him on the playing field.”); see also *Ferguson v. Charleston*, 532 U.S. 67, 87 (2001) (Kennedy, J., concurring) (listing *Vernonia*’s policy goal of “[d]eterring drug use by our Nation’s schoolchildren,” and particularly by student-athletes, because “the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.” (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661-62 (1995))).

¹¹⁷ *Earls*, 536 U.S. at 851-52.

¹¹⁸ *Id.* at 852.

¹¹⁹ *Id.* at 853.

deterrence least, and risks steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems.”¹²⁰

Ginsburg lastly applied the holding of *Chandler v. Miller*¹²¹ to the facts presented in *Earls* and found *Earls* similar in that it presented no evidence of a particular “concrete danger” at the school and the policy targeted a group not involved in “high-risk, safety-sensitive tasks.”¹²² She noted the desire of a school to communicate they are tough on drugs does not “trump the right[s]” of students “within the schoolhouse gate.”¹²³ In closing, Ginsburg emphasized the importance of the government’s role as a teacher of Constitutional values in public schools, quoting, “That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”¹²⁴

VI. DISCUSSION: GINSBURG’S DISSENT PROVIDES THE PROPER BAROMETER IN APPLYING THE SPECIAL NEEDS DOCTRINE IN THE PUBLIC SCHOOL CONTEXT

There is little doubt that on its face Justice Ginsburg’s dissent represents a lucid, comprehensive—and at times quite witty—analysis that undermines much of the majority’s reasoning in *Earls*.¹²⁵ However, it is one thing to render the majority’s

¹²⁰ *Id.*

¹²¹ 520 U.S. 305 (1997) (holding a Georgia statute requiring candidates for certain public offices to certify proof of negative urinalysis tests before qualifying for nomination to be unconstitutional).

¹²² *Earls*, 536 U.S. at 854.

¹²³ *Id.* at 855.

¹²⁴ *Id.* (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

¹²⁵ See Tony LaCroix, *Student Drug Testing: The Blinding Appeal of In Loco Parentis and the Importance of State Protection of Student Privacy*, 2008 BYU EDUC. & L.J. 251, 267-68 (2008) (describing Ginsburg’s dissent as “a dissenting opinion that is simultaneously lucid, pragmatic, and founded upon bedrock constitutional law”); Aaron Marcus, *Beyond the Classroom: A Reality Based Approach to Student Drug Testing*, 11 WHITTIER J. CHILD & FAM. ADVOC. 365, 383 (2004) (“Justice Ginsburg issued an impassioned dissent.”); Roger Pilon, *Tenants, Students, and Drugs: A Comment on the War on the Rule of Law*, 2002 CATO SUP. CT. REV. 227, 247 (2002) (stating that Ginsburg’s dissent “smartly dispatch[es]” with the majority opinion in *Earls*).

opinion baseless in light of the factual distinctions between *Vernonia* and *Earls* and quite another to articulate a proper standard for the “balancing test” of “special needs” within our public school system. The question then becomes: does Ginsburg’s dissent offer any guidance in administering the “special needs” doctrine within the public school context that is capable of maintaining fidelity to students’ Fourth Amendment rights while effectuating the proper governmental interest? At a closer glance, I believe the answer is yes.

A. Why Ginsburg’s Dissent Is Correct

Ginsburg grounds her dissent in two strains of reasoning. First, athletes generally face special health risks from the use of drugs. Second, the athletes in *Vernonia* were “leaders of the school drug culture,” which had reached “epidemic proportions.”¹²⁶ The underlying theme of both strains is they focus upon the third factor of the “special needs” balancing test: the nature and immediacy of the government’s concerns and the efficacy of the policy. By way of this reasoning, Ginsburg seems to implicitly set forth a factual threshold that mirrors the Tenth Circuit’s holding.¹²⁷ In order for a school district to impose a random suspicionless drug testing policy it must demonstrate an “identifiable drug abuse problem among a sufficient number of those subject to the testing, such that [the suspicionless drug] testing [of] that group of students will actually redress its drug problem.”¹²⁸ Thus, a testing policy under the framework of the Ginsburg dissent must be more than a mere symbolic gesture of a school’s tough stance on drugs. It must address whether a given policy will be effective in deterring drug use and whether there is an established special need at the specific school district.

In determining whether a governmental interest is deemed a special need with respect to drugs in public schools, there seems to

¹²⁶ *Earls*, 536 U.S. at 852 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 649 (1995)).

¹²⁷ See *Earls*, 536 U.S. at 850 (“As the Tenth Circuit observed, ‘without a demonstrated drug abuse problem among the group being tested, the efficacy of the District’s solution to its perceived problem is . . . greatly diminished.’” (quoting *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1277 (10th Cir. 2001))).

¹²⁸ *Earls*, 242 F.3d at 1278 (alteration to original).

be two separate standards articulated in *Vernonia* and *Earls*. The first standard, set forth in *Vernonia*, centered on the immediacy of confronting a “drug epidemic”¹²⁹ at Vernonia schools specifically, as well as athletes particular susceptibility to physical injury while engaged in both sports and drugs. The standard for a special need set forth in *Earls*, however, is much broader in scope, and seems to pertain to the “nationwide epidemic of drug use”¹³⁰ and its general effects on the well-being of students from a universal standpoint. While both standards address the grave concerns associated with drug use, only the standard set forth in *Vernonia* complies with the development of the “special needs” doctrine.

As evidenced in *Skinner* and *Von Raab*, the “special needs” doctrine centered upon the immediate and enormous risk of “lives and limbs” that could be lost through a corrupt customs official or railway operator under the influence of drugs, not “in response to the health risks to users invariably present in any case of drug use.”¹³¹ Further, in one of the few special needs cases in which governmental interests did not take precedent over individual Fourth Amendment protections, *Chandler v. Miller*, the Court found Georgia’s policy of random suspicionless drug testing of potential candidates for state office unconstitutional as there was no evidence of a particular drug problem and the targeted group was not involved in “high-risk, safety-sensitive tasks.”¹³² By allowing a school district with little evidence of drug abuse to implement a suspicionless drug testing policy, the *Earls* policy comports with the disallowed policy in *Chandler* while differing vastly from *Von Raab* and *Skinner* in that there is not an “immediate” threat to students involved with most non-athletic extracurricular activities that is not equally present for all young people. The only extracurricular activities that could pass muster under the *Von Raab* and *Skinner* threshold would be particular athletics involving a high degree of exertion and, in some instances, physical contact.

Thus, from Ginsburg’s dissent we can glean three requirements that should be inherent for a suspicionless drug

¹²⁹ *Earls*, 536 U.S. at 843.

¹³⁰ *Id.* at 824.

¹³¹ *Id.* at 850 (Ginsburg, J., dissenting).

¹³² *Chandler v. Miller*, 520 U.S. 305, 321-22 (1997).

testing regime to be constitutional. First, for the government's interest to qualify as a "special need," it must go beyond the mere factual findings of intermittent drug use present in virtually all high schools. The school district must show that its ability to "maintain[] security and order in the school[]"¹³³ has been significantly affected by student drug use. Second, the drug testing policy must be effective in that it tests students likely to do drugs and/or students that could influence other students to do drugs. Third, those being tested are involved in such activities that drug use could result in "immediate" harm differing from that associated with the general health risks for all students doing drugs.¹³⁴ Although these requirements appear to limit the applicability of suspicionless student drug testing to scenarios substantially similar to that in *Vernonia*, this is proper considering that in most instances a regime of individualized suspicion in administering drug tests is less invasive of student rights while likely equally effective.

B. Individualized Suspicion: Is There Room for the "Special Needs" Doctrine?

Undoubtedly, the special needs doctrine diminishes the framers' original intentions for suspicion-based searches. As noted in O'Connor's dissent in *Vernonia*, previous decisions allowing for suspicionless based searches were ruled constitutional "only after first recognizing the Fourth Amendment's longstanding preference for a suspicion-based search regime[] and then pointing to sound reasons why such a regime would likely be ineffectual under the unusual circumstances presented."¹³⁵ Though the majority

¹³³ *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). With respect to the inherent difficulties of maintaining order in public schools, the *T.L.O.* majority opined, "Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy." *Id.* at 338.

¹³⁴ One could also read Ginsburg's dissent to imply that only similarly situated athletes alone could be subject to random suspicionless based drug testing, as they have a greater diminished expectation of privacy when compared to non-athletes. See *Earls*, 536 U.S. at 846, 853-54 (Ginsburg, J., dissenting) (referring to athletes as a "population of students distinguished by their reduced expectation of privacy").

¹³⁵ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 674 (1995) (O'Connor, J., dissenting); see also *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 624 (1989) ("In limited circumstances, where the privacy interests implicated by the search are

opinions of both *Earls* and *Vernonia* center their analyses around the *T.L.O.* axiom that students “have a lesser expectation of privacy than member of the population generally,”¹³⁶ the search in *T.L.O.* nevertheless was still based on a form of individualized suspicion; specifically, reasonable suspicion.¹³⁷ To allow the holding in *Earls* to dictate a finding of special needs in such sharp contrast to previous decisions is to allow the statement that “special needs inhere in the public school context,” to nearly envelop the oft-quoted statement of *Tinker* that “students [do not] shed their constitutional rights . . . at the schoolhouse gate.”¹³⁸

Thus, in order to maintain the integrity of the Fourth Amendment, the “special needs” doctrine should be severely limited in the public school context and, as Justice O’Connor pointed out, be implemented only in those situations where it seems an individualized suspicion-based regime would be ineffectual.¹³⁹ As some commentators note, this could signal *Vernonia* was incorrectly decided if a suspicion-based regime could have been effective in maintaining the discipline and order integral to the learning environment.¹⁴⁰ But in instances such as *Vernonia*, where a drug culture has clearly run amok and “a large segment of the student body, particularly those involved in interscholastic athletics [are] in a state of rebellion,”¹⁴¹ an individualized scheme could prove overly vexatious. Moreover, there is an immediate need to maintain a disciplined and

minimal, and where an important governmental interest furthered by the intrusion *would be placed in jeopardy by a requirement of individualized suspicion*, a search may be reasonable despite the absence of such suspicion.” (emphasis added)).

¹³⁶ *T.L.O.*, 496 U.S. at 348 (Powell, J., concurring).

¹³⁷ See *T.L.O.*, 469 U.S. at 345-46; see also Brad Setterburg, Note, *Privacy Changes, Precedent Doesn’t: Why Board of Education v. Earls Was Judged by the Wrong Standard*, 40 HOUS. L. REV. 1183, 1215-16 (2003) (noting that the “Court ha[d] lost sight of the meaning behind [those] words” in *Vernonia* and *Earls*; as in *T.L.O.* the search was still based upon a form of individualized suspicion).

¹³⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹³⁹ *Vernonia*, 515 U.S. at 674 (O’Connor, J., dissenting).

¹⁴⁰ See Pilon, *supra* note 125, at 247-51 (concluding that *Vernonia* itself was incorrectly decided and that, as a result, the Fourth Amendment has been damaged in the process).

¹⁴¹ *Vernonia*, 515 U.S. at 649 (quoting *Acton v. Vernonia Sch. Dist.* 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992)).

productive educational setting that cannot be easily dismissed.¹⁴² While the special needs doctrine may have its uses in the public school context, its use in random suspicionless drug testing should perhaps be limited only to those circumstances that truly are "special."¹⁴³

C. Is a Suspicion-Based Regime Effective?

Little research has been done on the effectiveness of a suspicion-based regime of drug testing in public schools, but it is significant to note that the respondents in both *Earls* and *Vernonia* insisted on the implementation of a suspicion-based drug testing regime alone.¹⁴⁴ In *Earls* and *Vernonia*, the majority opinions proffered several reasons why a suspicion-based drug testing regime would be ineffectual.¹⁴⁵ One reason is the view that parents would be unwilling to accept accusatory drug testing of individual students as it would transform the process into a "badge of shame."¹⁴⁶ In *Vernonia*, Justice Scalia quotes Justice Powell's dissent in *Goss v. Lopez* for the assertion that the student-teacher relationship is one in which "the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute. It is rarely adversar[ial] in nature."¹⁴⁷ While it

¹⁴² Marcus, *supra* note 125, at 384-85 (writing that "'Special Needs' Can Stay," but factors of the special needs test need redefining in the wake of *Earls*).

¹⁴³ See Brooks, *supra* note 3, at 395 (stating that under *Earls* the Court "effectively dispensed with a meaningful 'special need,' as heightened physical risks and an immediate drug problem among those being tested are no longer necessary."). Although the majority in *Earls* was concerned with creating an arduous "constitutional quantum of drug use" for schools to implement a suspicionless drug testing program, *Earls*, 536 U.S. at 836, interpreting the holding of *Vernonia* to require a similar factual showing could still provide adequate discretion to state courts while encouraging programs of individualized suspicion. This discretion could create more distinct boundaries than the decision of *Earls*, which is consistently construed as what each individual school district defines "extracurricular activities" to mean. See Marcus, *supra* note 125, at 385 n.148 ("[A]pplying set principles to all schools may be somewhat problematic, but by no means does this argument invalidate the application of the 'special needs' test to public schools.").

¹⁴⁴ Bd. of Educ. v. *Earls*, 536 U.S. 822, 829 (2002) ("Respondents instead argue that drug testing must be based at least on some level of individualized suspicion."); *Vernonia*, 515 U.S. at 663 ("Respondents argue that a 'less intrusive means to the same end' was available, namely, 'drug testing on suspicion of drug use.'").

¹⁴⁵ See *supra* notes 64, 93 and accompanying text.

¹⁴⁶ *Vernonia*, 515 U.S. at 663.

¹⁴⁷ *Id.* at 664 (quoting *Goss v. Lopez*, 419 U.S. 565, 594 (Powell, J., dissenting)).

is true teachers often maintain a non-adversarial role, if they are truly to stand *in loco parentis* as the Court suggests it would seem their duty to address potential drug use in the same way a concerned parent would, which inevitably requires some form of confrontation.

Individualized suspicion is likely sufficient in and of itself for school officials to effectively combat the drug problem; it would not be unduly burdensome or uncomfortable for school officials who have probable cause.¹⁴⁸ As state actors trained in the education of children, they should be given the deference to determine whether a student may or may not have a drug problem based on the students' actions and statements in class. It is within this capacity that courts should give deference to the school systems in handling their drug problems and in determining what sanctions should be imposed based on the needs of the individual student.

Lastly, Justice O'Connor's well-reasoned dissent in *Vernonia* does all but dismiss many of the majority's concerns for suspicion-based testing,¹⁴⁹ and in choosing between the two standards it is clear that a regime of suspicion-based testing could likely be equally effectuated without diminishing the rights of the entire student population.¹⁵⁰ Even if a standard of individualized suspicion-based drug testing was proven less effectual, "there is nothing new in the realization' that Fourth Amendment protections come with a price."¹⁵¹

¹⁴⁸ *Vernonia*, 515 U.S. at 677 (O'Connor, J., dissenting) ("Schools already have adversarial, disciplinary schemes that require teachers and administrators in many areas besides drug use to investigate student wrongdoing (often by means of accusatory searches); to make determinations about whether the wrongdoing occurred; and to impose punishment.").

¹⁴⁹ *Id.* at 676-80.

¹⁵⁰ In keeping with the standard of *T.L.O.*, any drug testing regime of individualized suspicion should be based upon reasonable suspicion. *See supra* note 133; *see also Vernonia*, 515 U.S. at 676-77.

¹⁵¹ *Id.* at 680 (quoting *Arizona v. Hicks*, 480 U.S. 321, 329 (1987)). Justice O'Connor further elaborated on this point in *Vernonia*, stating:

I recognize that a suspicion-based scheme, even where reasonably effective in controlling in-school drug use, may not be as effective as a mass, suspicionless testing regime. In one sense, that is obviously true—just as it is obviously true that suspicion-based law enforcement is not as effective as mass, suspicionless enforcement might be. "But there is nothing new in the realization" that Fourth Amendment protections come with a price. Indeed, the price we pay is higher in the criminal context, given that police do not

D. The Subsequent Effect of the Earls Decision

Since *Earls*, it is clear the majority's holding that students involved in extracurricular activities can be subjected to random suspicionless drug tests has been not only applied but extended in several school districts. In *Joye v. Hunterdon Central Regional High School Board of Education*, a decision handed down only one year after *Earls*, the New Jersey Supreme Court held that suspicionless drug testing could be extended to those students who used the school parking lot for their cars.¹⁵² In several other school districts, the definition of "extracurricular activities" has been extended to include not only traditional electives in high school but field trips, dances, school plays, and even mere attendance at school-sponsored athletic events.¹⁵³ Although individual state courts may at times interpret their own constitutions as providing greater protections among public school students than current Fourth Amendment jurisprudence,¹⁵⁴ the fact remains that *Earls* offers such a wide latitude of constitutionally permissible drug testing that as long as a school district is not testing "all students," and has an available sanction

closely observe the entire class of potential search targets (all citizens in the area) and must ordinarily adhere to the rigid requirements of a warrant and probable cause.

Id. (citation omitted).

¹⁵² *Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ.*, 826 A.2d 624, 628-29 (N.J. 2003); see also *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972 (Ind. 2002) (upholding a school drug testing policy of those engaged in school athletics, extracurricular activities, and students who park their cars on the school). But cf. *Theodore v. Del. Valley Sch. Dist.*, 836 A.2d 76 (Pa. 2003) (interpreting the Pennsylvania State Constitution as recognizing a greater degree of privacy than the Fourth Amendment and declaring the school district's policy unconstitutional under Pennsylvania law without a more particularized showing of a drug problem at the school and the efficacy of the means chosen to address it); *York v. Wahkiakum Sch. Dist. No. 200*, 178 P.3d 995 (Wash. 2008) (declining to accept the Supreme Court's "special needs" exception with respect to student athletes and holding the collection of urine samples to be a significant invasion of privacy).

¹⁵³ See Associated Press, *Kansas Schools Take Drug Testing to Extreme*, MSNBC.COM (Sept. 13, 2006, 6:03 PM), <http://www.msnbc.msn.com/id/14819494>; see also Mary Plummer, *Middle Schoolers Face Random Drug Testing*, ABC NEWS (Jan. 13, 2011), <http://abcnews.go.com/US/TheLaw/nj-middle-schoolers-random-tested-drugs/story?id=12608164#.TxO20SN7WFc>.

¹⁵⁴ See *supra* note 152.

aside from school expulsion, their drug testing policy will likely pass constitutional muster.

The reaching impact of the *Earls* rationale does not end with random suspicionless drug testing, however. In *Doe v. Little Rock School District*,¹⁵⁵ the Little Rock School District's practice of conducting suspicionless searches of students and their belongings was challenged.¹⁵⁶ The district would routinely pick out classrooms at random and order the students therein to leave the room after removing everything from their pockets and placing all their belongings on the desks in front of them.¹⁵⁷ While the district attempted to rely on the "special needs" doctrine by showing a concern for discovering drugs and weapons in school, the Eighth Circuit held this did not extinguish all of a student's privacy interests, nor had the district proffered a showing that not engaging in the searches would have jeopardized some important governmental interest.¹⁵⁸ Though in this instance the extension of *Earls*' rationale was overruled, one can only speculate as to how many other school districts nationwide have developed similar protocols that are not legally challenged. *Earls* impact thus extends beyond its own factual premise in providing a vehicle to further deteriorate students' Fourth Amendment rights, and also extends past the *T.L.O.* standard of "reasonableness, under all the circumstances."¹⁵⁹

There is little doubt that nationwide adolescent drug use represents a grave concern for our country's public schools. While random suspicionless drug testing may seem like a viable solution, it may often produce results counterintuitive to what those who seek to implement it believe.¹⁶⁰ One such result is framed specifically in Ginsburg's dissent: "Even if students might be deterred from drug use in order to preserve their extracurricular

¹⁵⁵ *Doe v. Little Rock Sch. Dist.*, 380 F.3d 349 (8th Cir. 2004).

¹⁵⁶ *Id.* at 351.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 356. It is also significant to note that, in contrast to the disclosure policies in *Vernonia* and *Earls*, the district handed over results of the search to local law enforcement agencies, resulting in criminal sanctions. *Id.* at 355.

¹⁵⁹ *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

¹⁶⁰ See generally Floralyne Einesman & Howard Taras, *Drug Testing of Students: A Legal and Public Health Perspective*, 23 J. CONTEMP. HEALTH L. & POL'Y 231 (2007) (analyzing the benefits and inadvertent harm caused by student drug screening programs).

eligibility, it is *at least* as likely that other students might forgo their extracurricular involvement in order to avoid detection of their drug use.”¹⁶¹ Further, recent studies of random suspicionless drug testing show that it may not act as the substantial deterrent that courts are prone to project. In recent studies showing the effectiveness of drug testing,¹⁶² random suspicionless drug testing has been shown to have little correlation with the prevalence or frequency of marijuana or illicit drug use in schoolchildren and no effect on their intentions to use drugs in the future.¹⁶³ Drug testing itself can also be expensive for many schools, particularly those with larger student populations.

Lastly, the *Earls* decision has helped contribute to an expansion of the special needs doctrine far beyond what it was originally intended for, so much so that requiring an actual showing of “special needs” may no longer be a means for applying the exception, but a *check* on further suspicionless searches.¹⁶⁴ One scholar has suggested that the onset of the “special needs” doctrine has fell way to a “general Fourth Amendment approach,”¹⁶⁵ which broadens considerably the categories of

¹⁶¹ Bd. of Educ. v. Earls, 536 U.S. 822, 829, 853 (2002) (Ginsburg, J., dissenting) (emphasis added).

¹⁶² Ryoko Yamaguchi, Lloyd D. Johnston & Patrick M. O'Malley, *Relationship Between Student Illicit Drug Use and School Drug-Testing Policies*, 73 J. SCH. HEALTH 159 (2003), available at <http://studentdrugtesting.org/Michigan%20study.pdf>. But cf. U.S. DEPT. OF EDUC., THE EFFECTIVENESS OF MANDATORY-RANDOM STUDENT DRUG TESTING (2010), available at <http://ies.ed.gov/ncee/pubs/20104025/pdf/20104025.pdf> (finding that sixteen percent of students subject to suspicionless drug testing reported using substances covered by their school district's policy, as opposed to twenty-two percent of students reporting drug use without such a school program). The report further found there were no “spillover effects” to students not subject to the testing in schools with a suspicionless-based program, and that students' reported intentions to use illegal substances in the future was relatively the same, with thirty-four percent of the student population subject to suspicionless-based drug testing policies reporting that they intended to take drugs in the next twelve months in comparison to thirty-three percent of students with the same intention in schools without such a testing program. *Id.*

¹⁶³ See Yamaguchi, *supra* note 162, at 164.

¹⁶⁴ See Edwin J. Butterfoss, *School Children and Parolees: Not So Special Anymore*, 80 MISS. L.J. 805, 840-41, 843-44 (2011) (“[D]espite early criticism that the special needs exception opened the door to searches being found constitutional, it now appears the special needs exception, in contrast to the Court's ‘general Fourth Amendment approach,’ has a limiting effect on the range of government conduct justified under the Fourth Amendment.”).

¹⁶⁵ *Id.* at 829, 833-34.

individuals who may be subject to suspicionless searches¹⁶⁶ by creating a “much less constrained balancing test” approach in which an unrestricted governmental interest almost always trumps an individual’s right to some form of individualized suspicion.¹⁶⁷ Although the “special needs” doctrine at one time required an *actual* showing of a special governmental need “beyond the normal need for law enforcement,”¹⁶⁸ “[t]he door [now] appears to be open to finding the school setting no longer demands the application of the special needs exception, but permits suspicionless searches by school officials to be upheld under the Court’s new ‘general Fourth Amendment approach.’”¹⁶⁹

In essence, the decision in *Earls* has deteriorated the Constitutional rights of schoolchildren and expanded the Fourth Amendment definition of reasonableness far beyond the framers’ intentions while having scant evidence of any positive results that could not be achieved through a means of individualized suspicion.

E. How Ginsburg’s Dissent Frames the Proper Application of the Special Needs Balancing Test with Respect to Random Suspicionless Drug Testing

Ginsburg’s dissent suggests a new fact-based inquiry that relies on the *T.L.O.* principle that the legality of the search should depend on the reasonableness—in all circumstances—of the search, by requiring an objective showing that the individual school district meets the rigors of demonstrating an actual special need. As one commentator has noted:

Surprisingly, a workable compromise emerges in the dissents [of *Earls*]: a fact-based inquiry of reasonableness balanced around individualized suspicion, which acts as an exhaustion requirement for educators. . . . [A] suspicionless search is permitted, but only after a special need is objectively established. [This] approach suggests two virtues. The dissenters avoided presumptions . . . by using a more clearly objective standard than the equation favored by the majority [and,] [m]ore importantly, the Justices would have

¹⁶⁶ *Id.* at 825.

¹⁶⁷ *Id.* at 829-30 (internal quotation marks omitted).

¹⁶⁸ *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989).

¹⁶⁹ Butterfoss, *supra* note 164, at 844 (alteration to original).

maintained close proximity to traditional Fourth Amendment analysis and expectations, with courts keeping a watchful eye . . . that in the rare case, educators might have a special need justifying a departure from the individualized-suspicion standard.¹⁷⁰

Thus, as demonstrated by and advocated for by O'Connor's dissent in *Vernonia*, a requirement of individualized suspicion should be set as the default standard, for all public school drug testing, and it is only once this requirement has been exhausted and shown to be futile to the administration's efforts that in fact a random suspicionless drug testing policy should be implemented. In determining whether the school administration's efforts have become futile, a showing must also be made on the implicit requirements of Ginsburg's dissent: (1) has the school made a sufficient showing that its ability to maintain security and order has been significantly affected and disrupted by the drug problem; (2) will the drug testing policy be effective in deterring drugs in that it tests a group of students likely to do or shown to do drugs or influence their peers to use drugs; and (3) are those being tested involved in such activities that drug use could result in a type of "immediate" harm differing from that associated with the general health risks for all students using drugs.¹⁷¹ The determination of whether these factors are met will, of course, be grounded in the oft-cited *T.L.O.* standard that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."¹⁷²

¹⁷⁰ Bernard James, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court's Restatement of Student Rights After Board of Education v. Earls*, 56 S.C. L. REV. 1, 30 (2004) (alteration to original) (emphasis added) (footnote omitted).

¹⁷¹ The third parameter of the test will help alleviate Justice Ginsburg's concerns and the majority's argument of imperfect tailoring. *Bd. of Educ. v. Earls*, 536 U.S. 822, 851 (2002) (Ginsburg, J., dissenting) (addressing the majority's argument that not all athletes are subject to an immediate, specialized danger from the use of drugs while some extracurricular activity members may be subject to risk of immediate physical harm similar to those found in athletes). Such language would provide guidance to the state courts by allowing them to defer to *Vernonia* or, based upon the state's individual preference, allow for a wider variety of student extracurricular activities to be tested depending on how the state court defines "immediate harm." As Ginsburg noted, "[t]here is a difference between imperfect tailoring and no tailoring at all." *Id.* at 852.

¹⁷² *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

CONCLUSION

In light of the public school system's subsequent use of the *Earls* decision and in scope of the framers' original intentions for the Fourth Amendment, it seems that Justice Ginsburg not only adequately addresses the *Earls* majority's arguments but implicitly strikes a proper balance between the need for discipline and order in schools while keeping with both "special needs" and Fourth Amendment precedent. Though such a holding could be argued to place a burden on state courts in determining whether an individual school district made a proper showing of a special need, it is this middle-of-the-road approach in Ginsburg's dissent that would allow for discretion by state courts and school systems while keeping Fourth Amendment principles intact.

Matthew D. Sitton

RECENT DECISION

CONSTITUTIONAL LAW—ARREST AND DETENTION UNDER THE MATERIAL WITNESS STATUTE—OBJECTIVELY REASONABLE ARREST DID NOT VIOLATE FOURTH AMENDMENT

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I. FACTS

In March of 2003, Federal Bureau of Investigation agents apprehended Abdullah al-Kidd on a material-witness arrest warrant¹ as he checked-in for a flight to Saudi Arabia.² A

¹ *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2079 (2011). The federal material-witness statute permits a judge to authorize the “arrest of [a] person’ whose testimony ‘is

magistrate judge signed the warrant because of federal officials' statements that al-Kidd was a material witness to crimes committed by Sami Omar al-Hussayen, and that al-Kidd's departure presented a likelihood that crucial information in al-Hussayen's prosecution would be lost.³ Federal authorities held al-Kidd for sixteen days, and he was placed under supervised release until the end of al-Hussayen's trial fourteen months later.⁴

In March of 2005, Al-Kidd filed a claim against United States Attorney General John Ashcroft challenging the constitutionality of his material-witness arrest.⁵ Al-Kidd's complaint made several allegations, including the allegation that his arrest under the material-witness statute was pretextual in nature and that federal officials had no intention of calling al-Kidd as a witness.⁶ Ashcroft filed a motion to dismiss al-Kidd's claim based upon

material in a criminal proceeding . . . if it is shown that it may become impracticable to secure the presence of the person by subpoena." *Id.* (quoting 18 U.S.C. § 3144 (2006)) (alterations in the original); see *infra* notes 23-25 and accompanying text.

² *Id.* at 2079. Al-Kidd was a United States citizen with a wife and two children. *Al-Kidd v. Ashcroft*, 580 F.3d 949, 951 (9th Cir. 2009), *rev'd*, 131 S. Ct. 2074 (2011). Born Lavoni T. Kidd in Wichita, Kansas, he was a recent Muslim convert. *Id.* at 952. For a brief period of time in 2002, he was under surveillance as part of a broad anti-terrorism investigation. *Id.*

³ *Al-Kidd*, 131 S. Ct. at 2079. The affidavit, filed by a FBI special agent, contained descriptions of contact al-Kidd allegedly had with al-Hussayen. *Al-Kidd*, 580 F.3d at 952. It stated that al-Kidd had received more than \$20,000 from al-Hussayen, and that al-Kidd had met with associates of al-Hussayen after returning from an excursion to Yemen. *Id.* It further stated that al-Kidd had bought a one-way ticket to Saudi Arabia, at a cost of \$5000. *Id.* at 953. Justice Ginsburg pointed out in her concurrence that some of the information contained in the affidavit was false. *Al-Kidd*, 131 S. Ct. at 2088 (Ginsburg, J., concurring). For example, al-Kidd's ticket to Saudi Arabia was actually a round-trip ticket, purchased at a price of \$1700, not \$5000. *Id.*

⁴ *Al-Kidd*, 131 S. Ct. at 2079.

⁵ *Id.* Al-Kidd filed what is known as a *Bivens* action. *Id.* In *Bivens*, the Supreme Court established that a person is entitled to money damages for injuries that occur as a result of a violation of his or her Fourth Amendment rights by federal officials. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). Al-Kidd made several other claims against Ashcroft and other parties, but they were considered irrelevant, and the Court declined to hear them. *Al-Kidd*, 131 S. Ct. at 2079.

⁶ *Al-Kidd*, 131 S. Ct. at 2079. Al-Kidd made allegations that, after the attacks of September 11, 2001, John Ashcroft, the acting United States Attorney General, instructed federal officials to detain individuals under the material-witness statute if they suspected the individuals of supporting terrorism but did not have sufficient evidence to charge them with a crime. *Id.*

absolute and qualified immunity.⁷ The United States District Court for the District of Idaho denied Ashcroft's motion.⁸ Ashcroft appealed to the United States Court of Appeals for the Ninth Circuit.⁹ The Ninth Circuit affirmed the denial of Ashcroft's motion, and held that the "Fourth Amendment prohibits pretextual arrests absent probable cause of criminal wrongdoing, and that Ashcroft could not claim qualified or absolute immunity."¹⁰

The United States Supreme Court granted certiorari and held: reversed and remanded.¹¹ Where an arrest of a material witness was objectively reasonable and pursuant to a validly obtained warrant, it could not be challenged as unconstitutional based on an allegation that the arresting authority had an improper motive; and thus, such an action did not abrogate qualified immunity for a government official.¹²

II. RELATED LAW

A. The Fourth Amendment on Seizures and Reasonableness

The Fourth Amendment states: "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ."¹³ Courts have determined that a seizure occurs, for purposes of the Fourth Amendment, where a law enforcement official accosts an individual and "restrains his freedom to walk away."¹⁴ Once a seizure has taken place, the language of the

⁷ *Id.*

⁸ *Al-Kidd*, 580 F.3d at 956.

⁹ *Al-Kidd*, 131 S. Ct. at 2079.

¹⁰ *Id.* (citing *al-Kidd*, 580 F.3d at 949).

¹¹ *Id.* at 2080, 2085.

¹² *Id.* at 2085.

¹³ U.S. CONST. amend. IV.

¹⁴ *Terry v. Ohio*, 392 U.S. 1, 16 (1968). The Court has noted: "An arrest, of course, qualifies as a 'seizure' . . ." *Al-Kidd*, 131 S. Ct. at 2080 (citing *Dunaway v. New York*, 442 U.S. 200, 207-08 (1979)). An arrest can be more generally described as requiring either physical force or, where there is no force, a submission to an assertion of authority. *California v. Hodari D.*, 499 U.S. 621, 626 (1991); *see also* *United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (holding that a person is only seized through physical force or a show of authority where his freedom of movement is restrained).

Fourth Amendment requires that the seizure be reasonable.¹⁵ The reasonableness of the seizure depends upon “all of the circumstances surrounding the . . . seizure and the nature of the . . . seizure itself.”¹⁶ The Supreme Court has described this “reasonableness” standard as one of primarily objective concern.¹⁷ The Court has required that an objective standard be used when examining the reasonableness of a seizure because law enforcement officers are required to make searches and seizures based on objective facts, not the officers’ subjective feelings.¹⁸ Furthermore, the Court has historically considered objectiveness as vital in promoting “[e]venhanded law enforcement.”¹⁹

¹⁵ *Virginia v. Moore*, 553 U.S. 164, 168 (2008); *see also* *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985). The Supreme Court has first looked to statutes and common law to determine whether a search of seizure was reasonable. *Moore*, 553 U.S. at 168. Where the Court was unable to find an answer in statutory or common law, the Court analyzed such an action “in light of traditional standards of reasonableness ‘by assessing . . . the degree to which it intrudes upon an individual’s privacy and . . . the degree to which it is needed for the promotion of legitimate governmental interests.’” *Id.* at 171 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

¹⁶ *Montoya de Hernandez*, 473 U.S. at 537 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 337-42 (1985)).

¹⁷ *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004). In *Terry*, the Supreme Court stated that it is important that “those charged with enforcing the laws . . . [are] subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular . . . seizure in light of the particular circumstances.” *Terry*, 392 U.S. at 21 (citations omitted). Furthermore, the Court noted that when evaluating the standard of reasonableness “it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure . . . ‘warrant a man of reasonable caution in the belief that the action taken was appropriate[.]’” *Id.* at 21-22 (citations omitted).

¹⁸ *Terry*, 392 U.S. at 22. The Court believed that its reasonableness approach should mirror the approach law enforcement officers take when deciding whether to institute a search or seizure. *Id.* Law enforcement officers may only carry out a legal search or seizure based on objective reasons, so these objective reasons should be the ones examined. *Id.* Otherwise, “[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . .” *Id.* (citations omitted).

¹⁹ *Devenpeck*, 543 U.S. at 153 (quoting *Horton v. California*, 496 U.S. 128, 138 (1990)). The Fourth Amendment was not meant to regulate the thoughts of law enforcement officials when making a search and seizure; it was meant to regulate their associated conduct. *See* *Bond v. United States*, 529 U.S. 334, 338-39 & n.2 (2000).

B. The Material-Witness Statute

The material-witness statute allows a judicial officer to order the arrest of someone who is shown to have testimony “material” to a criminal proceeding when circumstances indicate that, without further action, it will be extremely difficult to secure that person’s presence by subpoena in the future.²⁰ This law functions to prevent a material witness to a crime from evading his obligation to society to testify against the wrongdoer.²¹ There are several restrictions on the use of this statute because it involves the detention of individuals who are not charged with a crime.²² Detention is not allowed under the statute if conditions exist that could “reasonably assure the presence of the person as required,”²³ or if the material witness’ testimony could be secured by deposition.²⁴ Furthermore, detention must cease at any point where such detention is no longer necessary to prevent a “failure of justice.”²⁵

Despite these safeguards, critics have decried the use of this statute in the post-9/11 environment.²⁶ Critics point out that arrests made early in the life of the statute were consistent with its original purpose, but that arrests in the post-9/11 period have

²⁰ See *supra* note 2 and accompanying text; see also David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 700-01 (2009).

²¹ Cole, *supra* note 20, at 701.

²² Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT’L SECURITY J. 85, 87-89 (2011).

²³ 18 U.S.C. § 3142(e) (2006 & Supp. 2009). Detention under the material-witness statute is proper only where “no condition or combination of conditions will reasonably assure the appearance of the person as required.” *Id.*

²⁴ 18 U.S.C. § 3144 (2006).

²⁵ *Id.*; see also FED. R. CRIM. P. 15(a)(2). This rule specifically allows a detainee under the statute to request to be deposed. FED. R. CRIM. P. 15(a)(2). A court can then order a deposition at its discretion and discharge the detainee once he has signed the deposition transcript while under oath. *Id.*

²⁶ See Ricardo J. Bascuas, *The Unconstitutionality of “Hold Until Cleared”: Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677, 680-81 (2005) (arguing material-witness arrests are the ones the Fourth Amendment was meant to bar); see also Bradley A. Parker, *Abuse of the Material Witness: Suspects Detained as Witnesses in Violation of the Fourth Amendment*, 36 RUTGERS L. REC. 22, 23 (2009) (detaining individuals under material-witness statutes violates the Fourth Amendment because arrests lack probable cause).

been illegitimate.²⁷ Complaints have included allegations that material-witness detainees are treated more like suspected criminals than as witnesses to crimes²⁸ and that their identities are often kept under seal, limiting public scrutiny of the practice.²⁹ Critics of the material-witness statute have also pointed out the differences in the probable cause standard, needed to support an arrest for a crime, and the reasonable suspicion standard, needed to support an arrest under the material-witness statute.³⁰ Scholars have accused authorities of using the federal material-witness statute to conduct pretextual arrests, and many claim that such a policy is unconstitutional.³¹ Despite these attacks, however, the constitutionality of the material-witness statute itself has not been called into question.³²

C. *City of Indianapolis v. Edmond*

In *City of Indianapolis v. Edmond*, the Supreme Court examined the Fourth Amendment reasonableness of a seizure at a

²⁷ Parker, *supra* note 26, at 23.

²⁸ *Id.*

²⁹ Bascuas, *supra* note 26, at 686.

³⁰ Heidee Stoller et al., Comment, *Developments in Law and Policy: The Costs of Post-9/11 National Security Strategy*, 22 YALE L. & POL'Y REV. 197, 201 (2004). A suspected criminal cannot be arrested until there is enough evidence of criminal activity for probable cause that the individual committed the crime. *Id.* Those detained under the material-witness statute are arrested solely upon statements from a law enforcement official on an affidavit that there is a reasonable suspicion the witness possesses important knowledge. *Id.*

³¹ *Id.* at 200-01. Other complaints mention inhumane treatment of the detainees and the fact that many of the detainees are never called to testify. *Id.* at 200. Some are later indicted for crimes, and this supports allegations that such arrests are pretextual so as to arrest an individual for a crime before sufficient evidence exists for an indictment. *Id.*

³² See *New York v. O'Neill*, 359 U.S. 1, 5, 7 (1959) (holding that a Florida statute allowing detention of a material witness was constitutional); *United States v. Awadallah*, 349 F.3d 42, 56 (2d Cir. 2003) (recognizing that "the detention of material witnesses for the purpose of securing grand jury testimony has withstood constitutional challenge"); *Bacon v. United States*, 449 F.2d 933, 941 (9th Cir. 1971) (referring to a material-witness statute and stating that "[t]he constitutionality of this statute apparently has never been doubted" (citing *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 617 (1929))).

vehicle checkpoint stop.³³ The City of Indianapolis was operating vehicle checkpoints for the purpose of stopping the transportation and possession of illegal narcotics into the city.³⁴ Department directives instructed officers conducting vehicle checkpoint stops to search a vehicle only if the vehicle owner consented or if there was an appropriate amount of particularized suspicion.³⁵ Two men who were stopped at the checkpoints filed a lawsuit against the city, claiming that the checkpoints violated the Fourth Amendment and the Indiana Constitution.³⁶ After a hearing, the United States District Court for the Southern District of Indiana denied their motion for a preliminary injunction to enjoin the city.³⁷ A divided Seventh Circuit reversed the lower court's decision and held that the roadblocks infringed upon the Fourth Amendment.³⁸ The Supreme Court granted certiorari and affirmed the Seventh Circuit's decision.³⁹ The Court held that the Indianapolis Police Department's purpose in operating the vehicle checkpoints was to uncover evidence of ordinary criminal activity; therefore, the program's function violated the Fourth Amendment.⁴⁰

The Court made several important observations regarding the reasonableness of seizures and the appropriate method for determining their reasonableness.⁴¹ The Court has traditionally held that seizures made without individualized suspicion are only acceptable in very specific situations.⁴² When determining

³³ *City of Indianapolis v. Edmond*, 531 U.S. 32, 36 (2000). A vehicle stop at a roadblock is a seizure for the purposes of the Fourth Amendment. *Id.* at 40 (citing *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444, 450 (1990)).

³⁴ *Id.* at 34.

³⁵ *Id.* at 35.

³⁶ *Id.* at 36.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 41-42.

⁴¹ *Id.* at 47.

⁴² *Id.* at 37. The Court has upheld suspicionless seizures at vehicle checkpoints when the primary goal of the stop necessitates such drastic measures. *E.g.*, *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (holding that sobriety checkpoints are constitutional); *Delaware v. Prouse*, 440 U.S. 648, 663 & n.26 (1979) (suggesting that a roadblock operated for the purpose of verifying driver's licenses and vehicle registrations likely constitutional); *United States v. Martinez-Fuerte*, 428 U.S. 543, 545

whether individualized suspicion is necessary for a seizure, the Court engages in a balancing process, taking into account the nature of the interests threatened and the relation of the interests to the challenged law enforcement practice.⁴³ The Court reasoned that the city's goal of stopping the transport and possession of illegal narcotics was almost indistinguishable from its general goal of combating everyday criminal behavior.⁴⁴ The Court has refused to allow vehicle checkpoint programs where the primary purpose was to control and prevent ordinary criminal behavior.⁴⁵

Lastly, the Court addressed the city's contention that prior decisions by the Court did not allow inquiry into the city's primary purpose for the vehicle checkpoint program.⁴⁶ The Court stated that subjective examinations are not improper where searches and seizures are part of a program or "regime."⁴⁷ The Court distinguished the city's case by stating that the law required an inquiry into the primary purpose when seizures were made without individualized suspicion as part of a program of searches

(1976) (holding stops designed to intercept illegal aliens are constitutional). A seizure normally requires individualized suspicion to avoid being unreasonable. *Edmond*, 531 U.S. at 37 (citing *Chandler v. Miller*, 520 U.S. 305, 308 (1997)). The Court, however, has refused to "limit the purposes that may justify a checkpoint program to any rigid set of categories." *Id.* at 44.

⁴³ *Edmond*, 531 U.S. at 47. In this case, society's "general interest in crime control" was not enough to create a "justification for a regime of suspicionless stops." *Id.* at 41 (quoting *Prouse*, 440 U.S. at 659 n.18). The Court has deemed such vehicle checkpoints as intrusions and reasoned that the need for individualized suspicion provides a check on law enforcement's ability to conduct vehicle checkpoints, preventing such intrusions from encroaching upon constitutional freedoms. *Id.* at 47. The Court has interpreted the Fourth Amendment to give individuals freedom from excessive, unreasonable seizures. *See id.*

⁴⁴ *Id.* at 42. The Court rejected the city's argument that the "severe and intractable nature of the drug problem" separated it from other crimes in the general crimes category. *Id.* (citation omitted). The Court rejected comparisons to sobriety checkpoints because drug possession by motorists did not present the immediate, vehicular threat to life as did drunk drivers. *Id.* at 43. The Court also refused to recognize the city's comparisons of their drug stops to border stops made to detect smuggling of illegal aliens. *Id.*

⁴⁵ *See supra* note 43 and accompanying text.

⁴⁶ *Edmond*, 531 U.S. at 45.

⁴⁷ *Id.* (citing *Whren v. United States*, 517 U.S. 806, 810-13 (1996)). The city attempted to analogize the vehicle checkpoints to a vehicle stop made by an individual officer with reasonable suspicion that a crime has been or is being committed. *Id.*

and seizures.⁴⁸ Although a reasonableness examination of a seizure under the principles of the Fourth Amendment was “predominantly an objective inquiry,” the Court included vehicle stop programs as one of the three exceptions where purpose or subjective intentions may be analyzed.⁴⁹

D. *Whren v. United States*

In *Whren v. United States*, the Supreme Court examined the reasonableness of a traffic stop under the Fourth Amendment when the police officers allegedly had an improper pretext for making the stop.⁵⁰ Washington D.C. police officers were patrolling a high crime area when they spotted a driver and a passenger, in a truck with a temporary license plate, acting suspiciously at a stop light.⁵¹ The officers followed the truck and observed it turn without signaling and accelerate at an unreasonable rate of speed.⁵² Upon stopping the vehicle, one of the officers approached the truck and observed two bags of drugs in the hands of one of the occupants.⁵³ The occupants were arrested and indicted on various federal drug charges.⁵⁴ The two men filed a motion to suppress the drug evidence and argued that the officers lacked probable cause or reasonable suspicion that they were involved in illegal drug activity.⁵⁵ They also argued that the officer’s stated purpose for approaching their vehicle, to confront the driver about traffic violations, was a pretext for searching for drugs.⁵⁶

⁴⁸ *Id.* at 45-46 (“[P]rogrammatic purposes may be relevant to the validity of the Fourth Amendment intrusions undertaken pursuant to a general scheme *without* individualized suspicion.” (emphasis added)).

⁴⁹ *Id.* at 47. Special-needs and administrative-search cases have demonstrated that purpose may be relevant where there is a lack of individualized suspicion. *Id.* The third exception is that purpose may be examined where there is a program of searches and seizures not based on individualized suspicion. *Id.* at 45-46; see *supra* note 48 and accompanying text. The Court in *Whren* mentioned yet another exception. *Whren*, 517 U.S. 806, 817 (1996); see *infra* note 61 and accompanying text.

⁵⁰ *Whren*, 517 U.S. at 808.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 808-09.

⁵⁴ *Id.* at 809.

⁵⁵ *Id.*

⁵⁶ *Id.*

The United States District Court for the District of Columbia denied the motion to suppress and the two men were convicted of the charges.⁵⁷ The District of Columbia Circuit for the United States Court of Appeals affirmed their convictions,⁵⁸ and the men appealed to the Supreme Court, which granted certiorari.⁵⁹ The Court held that the subjective intentions or ulterior motives of police officers are not examined in an ordinary Fourth Amendment analysis, and will not invalidate a search or seizure where probable cause exists.⁶⁰ Furthermore, the Court stated that a balancing process, weighing governmental and individual interests, will always find a search or seizure reasonable under the Fourth Amendment when that search or seizure is based upon probable cause.⁶¹

E. Qualified Immunity

A state or federal official may affirmatively plead qualified immunity when an individual has filed a civil claim requesting damages against the official for an alleged violation of that individual's federal constitutional rights.⁶² If successful, it protects an official from civil damages liability for violations of an individual's constitutional rights if the official was performing a

⁵⁷ *Id.* The district court stated that "the facts of the stop were not controverted," and "[t]here was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop." *Id.* (citation omitted).

⁵⁸ *Id.* The Court of Appeals stated that "regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation." *Id.* (quoting *United States v. Whren*, 53 F.3d 371, 374-75 (D.C. Cir. 1995), *aff'd*, 517 U.S. 806 (1996)).

⁵⁹ *Id.*

⁶⁰ *Id.* at 813. In this case, the officers had probable cause to believe that the vehicle had violated traffic laws, offenses that warranted a vehicle stop. *Id.* at 808-09.

⁶¹ *Id.* at 817. The Court has found that even where probable cause exists, a balancing analysis is needed where a search or seizure is conducted in an extreme manner that threatens an individual's safety or personal privacy. *See Tennessee v. Garner*, 471 U.S. 1, 3, 8-9 (1985) (balancing process needed for a seizure by deadly force); *Winston v. Lee*, 470 U.S. 753, 755, 760 (1985) (balancing process needed for a seizure involving physical penetration of the body); *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) (balancing process needed for an entry into a home without a warrant).

⁶² *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

discretionary function within the scope of his job.⁶³ An individual, however, may circumvent an official's qualified immunity defense if he can show that the official's conduct met two criteria.⁶⁴ First, that the official violated a recognized constitutional or statutory right.⁶⁵ And second, that the right was "clearly established."⁶⁶ As a defense, qualified immunity has functioned fairly effectively, providing "ample protection" to government officials in performance of their duties.⁶⁷

III. *ASHCROFT V. AL-KIDD*

A. Majority Opinion

In *al-Kidd*, the Supreme Court addressed the issue of whether former United States Attorney General John Ashcroft could successfully assert his qualified immunity defense where al-Kidd alleged that Ashcroft's authorization of al-Kidd's detention under the federal material-witness statute violated the Fourth Amendment.⁶⁸ The Court held that because the material-witness warrant was based on individualized suspicion, an objective inquiry deemed it reasonable under the Fourth Amendment;

⁶³ *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). This type of immunity addressed concerns that civil damages suits against public officials affected society negatively by perpetuating a fear of individual monetary liability and risk of litigation that could prevent public officials from performing their duties effectively. *Id.* at 639-40.

⁶⁴ *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (citing *Harlow*, 457 U.S. at 818).

⁶⁵ *Id.* (citing *Harlow*, 457 U.S. at 818).

⁶⁶ *Id.* (quoting *Harlow*, 457 U.S. at 818). "Clearly established" means that the "contours" of the legal right must be clear. *Id.* at 2083 (quoting *Anderson*, 483 U.S. at 640). The two-tiered standard was meant to "avoid excessive disruption of government" and be fairly straightforward, allowing the "resolution of many insubstantial claims on summary judgment." *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (quoting *Harlow*, 457 U.S. at 818).

⁶⁷ *Malley*, 475 U.S. at 349 (Powell, J., concurring); see *supra* note 65 and accompanying text. Qualified immunity should only fail as a defense when the official acts with total incompetence, or knowingly and purposefully breaks the law. *Malley*, 475 U.S. at 349.

⁶⁸ *Al-Kidd*, 131 S. Ct. at 2079.

therefore, Ashcroft did not violate al-Kidd's constitutional rights.⁶⁹ The Court also held that Ashcroft did not violate any clearly established law and was entitled to a qualified immunity defense.⁷⁰

The Court's opinion began by mentioning that the Ninth Circuit had addressed both prongs of the two-prong qualified immunity test.⁷¹ Thus, the Court had full discretion to correct the lower court's erroneous decisions on both prongs, even if such an analysis was not necessary to reverse the lower court's judgment.⁷²

Under the first prong of the qualified immunity test, the Court addressed whether Ashcroft violated a statutory or constitutional right.⁷³ The Court stated that the reasonableness standard under the Fourth Amendment required an objective inquiry.⁷⁴ The Court examined the facts to determine if they warranted an exception to the Court's normal policy of not probing subjective intent.⁷⁵ The Ninth Circuit had relied upon such an exception when it ruled that *Edmond* allowed a determination of the purpose of a program where a seizure involved a lack of

⁶⁹ *Id.* at 2082-83. The Court rejected the idea that there should be a subjective inquiry into the alleged pretext of al-Kidd's arrest since his arrest was based upon individualized suspicion. *Id.* at 2082.

⁷⁰ *Id.* at 2085.

⁷¹ *Id.* at 2080. The Court's opinion included a prelude which contained a short discussion on the parameters of the material-witness statute. *Id.* at 2079; *see also supra* notes 20-31 and accompanying text. It also included a background discussion of the purpose of the qualified immunity defense and the two-prong test used to determine if it is abrogated. *Al-Kidd*, 131 S. Ct. at 2080; *see also supra* notes 64-70 and accompanying text.

⁷² *Al-Kidd*, 131 S. Ct. at 2080. The Court mentioned that it should be very careful when "expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'" *Id.* (quoting *Pearson v. Callahan*, 555 U.S. 223, 236-37 (2009)). The Court stated that it needs to exercise this discretion to prevent lower courts from keeping novel constitutional issues from its review and deciding constitutional questions incorrectly. *Id.* The Court was also concerned that the lower courts' language could possibly degrade the defense of qualified immunity. *Id.*

⁷³ *Id.*

⁷⁴ *Id.*; *see supra* notes 15-19 and accompanying text.

⁷⁵ *Al-Kidd*, 131 S. Ct. at 2082.

probable cause.⁷⁶ The Court corrected the Ninth Circuit's interpretation of *Edmond*, stating that *Edmond* approved a subjective inquiry into the purpose of a program only where Fourth Amendment intrusions were part of a grand scheme with no individualized suspicion.⁷⁷ The Court distinguished the facts in al-Kidd's case from those in *Edmond*, highlighting the fact that the warrant against al-Kidd was issued by a neutral magistrate judge and that the affidavit filed alongside the warrant enumerated specific reasons why al-Kidd was a material witness.⁷⁸ Those facts established individualized suspicion; therefore, the *Edmond* exception did not apply.⁷⁹ Additionally, the Court stated that the standard of individualized suspicion was a high one, and it provided more than sufficient protection for an individual's Fourth Amendment rights.⁸⁰

The Court also rejected another of al-Kidd's arguments: that *Whren* required the Court to ignore subjective intent only where there is probable cause to believe a law has been broken.⁸¹ The Court rejected al-Kidd's incorrect interpretation of *Whren* because even if an official had ulterior motives, such motives would not invalidate a search or seizure that was legitimate for separate reasons.⁸² The Court concluded its examination of the first prong

⁷⁶ *Id.* at 2081. The Court quickly dismissed any comparisons of al-Kidd's arrest to special-needs and administrative-search cases, where the actual motivations of law enforcement officials making an arrest do matter, because his arrest was based on an arrest warrant issued by a judicial official. *Id.*; see *supra* note 49. The Ninth Circuit had relied upon another exception to this general principle, the *Edmond* exception. *Al-Kidd*, 131 S. Ct. at 2081; see *supra* notes 48-49 and accompanying text.

⁷⁷ *Al-Kidd*, 131 S. Ct. at 2081 (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000)).

⁷⁸ *Id.* at 2082.

⁷⁹ *Id.*; see *supra* note 48-49 and accompanying text.

⁸⁰ *Al-Kidd*, 131 S. Ct. at 2082. The Court recognized this standard as greater than the one present in most of their cases inquiring into intent. *Id.* The Court was adamant that an objective standard has been applied in situations where there was probable cause and no warrant, so a situation where there was a valid warrant coupled with individualized suspicion should not necessitate a subjective inquiry. *Id.*

⁸¹ *Id.* (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)). The arrest of al-Kidd did not involve a violation of a law. *Id.* When taken out of context, the Court's statements in *Whren* could suggest that the circumstances surrounding al-Kidd's arrest necessitated a subjective inquiry. *Id.*

⁸² *Id.* The Court had referred to "probable cause to believe a crime had occurred" because it was the legitimizing factor in the situation at hand. *Id.* This did not mean

of qualified immunity by holding that Ashcroft did not violate al-Kidd's Fourth Amendment rights because the material-witness warrant, which was supported by individualized suspicion, was validly obtained under an objective inquiry.⁸³

Finally, the Court examined the second prong of the qualified immunity test and the Ninth Circuit's determination that Ashcroft had indeed violated a "clearly established" legal right.⁸⁴ At the time of al-Kidd's arrest, there was no established precedent ruling that an objectively reasonable material-witness arrest warrant could somehow violate a constitutional right.⁸⁵ The Court harshly criticized the Ninth Circuit for finding a clearly established right.⁸⁶ The Ninth Circuit based its opinion upon dicta in a footnote from a federal district court opinion out of New York⁸⁷ and other cases present in the "broad history and purposes of the Fourth Amendment."⁸⁸ Even if it had found differently in its first-prong analysis, the Court concluded, that right would in no way be "clearly established."⁸⁹

that there could not be other legitimizing factors. *Id.* at 2083. In this case the validly obtained warrant issued by a judicial official was the legitimizing factor, meaning no subjective inquiry was needed. *Id.*

⁸³ *Id.*

⁸⁴ *Id.* The Court could have decided the issue of qualified immunity based on the determination that Ashcroft had not violated a known statutory or constitutional right. The Court deemed it necessary, however, to comment on the Ninth Circuit's finding that the violated right was indeed "clearly established." *Id.* at 2083-84; see *supra* note 79.

⁸⁵ *Al-Kidd*, 131 S. Ct. at 2083. There need not be a case directly on point in order to consider a right as "clearly established," but precedent must have established the existence of that legal right beyond logical debate. *Id.*

⁸⁶ *Id.* at 2084.

⁸⁷ *Id.* at 2083-84. The footnote, found in *United States v. Awadallah*, lacked any citations supporting it. *Al-Kidd*, 131 S. Ct. at 2083 (citing *United States v. Awadallah*, 202 F. Supp. 2d 55, 77 n.28 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (2d Cir. 2003)). It suggested that the pretextual use of a material-witness warrant for preventive detention of suspected terrorists or terrorist supporters was an "illegitimate use of the statute." *Id.* (quoting *Awadallah*, 202 F. Supp. 2d at 77 n.28). Such language suggested that this illegitimate use could then be considered unconstitutional. *Id.* at 2084.

⁸⁸ *Id.* (quoting *al-Kidd*, 580 F.3d 949, 971 (9th Cir. 2010)). The Court admonished the Ninth Circuit for making loosely defined statements of law with no legal support. *Id.* The Ninth Circuit's opinion even mentioned the founding fathers' disgust for general warrants issued by the English Crown, and analogized the British general warrants with material-witness warrants. *Id.*

⁸⁹ *Id.* at 2085.

The Court reversed the Ninth Circuit's ruling that denied Ashcroft a qualified immunity defense.⁹⁰ Al-Kidd's material-witness arrest warrant was valid and could not be constitutionally challenged on the basis of alleged improper motives of government officials.⁹¹

B. Justice Kennedy's Concurring Opinion

Justice Kennedy, joined as to Part I by Justices Ginsburg, Breyer, and Sotomayor, agreed with the Court's majority opinion in full, stating that Ashcroft could indeed assert a qualified immunity defense.⁹² In his concurrence, he highlighted two additional observations.⁹³ Justice Kennedy noted that the Court did not entertain an argument that the material-witness statute itself was unconstitutional.⁹⁴ There may be, he argued, situations in which the use of a material-witness statute would be unlawful.⁹⁵ Justice Kennedy further observed that warrants issued in compliance with the Fourth Amendment are typically based upon probable cause, yet material-witness warrants are issued under a different standard.⁹⁶ For Justice Kennedy, these questions created uncertainty as to the validity of future arrests under the material-witness statute.⁹⁷

Justice Kennedy's second observation detailed why the evaluation of whether a constitutional right is "clearly established," for purposes of the two two-prong qualified immunity test, requires a high standard.⁹⁸ For example, the existence of

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* (Kennedy, J., concurring).

⁹³ *Id.*

⁹⁴ *Id.* Justice Kennedy pointed out that al-Kidd only asserted that his arrest was unconstitutional because of the alleged pretextual use of the statute, but did not argue that the statute itself was unconstitutional. *Id.*

⁹⁵ *Id.* at 2085-86. Justice Kennedy gave an example of a situation where a normal citizen might observe a crime right before taking a scheduled flight abroad and subsequently have a material-witness warrant issued against him. *Id.* at 2086. It is unclear, in Justice Kennedy's example, what would happen if the citizen was willing to testify. *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

inconsistent law in varying jurisdictions could make it difficult for upper-level government officials to adequately perform their jobs.⁹⁹ To Justice Kennedy, the case at hand invoked these concerns because the Ninth Circuit's opinion had relied upon dicta in a footnote from a district court opinion as "clearly established" law binding upon the acting United States Attorney General.¹⁰⁰

C. Justice Ginsburg's Concurring Opinion

Justice Ginsburg, joined by Justices Breyer and Sotomayor, concurred in the judgment.¹⁰¹ Justice Ginsburg agreed with the majority's judgment that Ashcroft did not violate a "clearly established law" and was immune from al-Kidd's civil suit seeking damages.¹⁰² Her concurrence, however, disagreed with the majority opinion's ruling on the merits.¹⁰³ Justice Ginsburg further disagreed with the majority's assumption that the material-witness arrest warrant was validly obtained because of misstatements in the affidavit filed with the warrant.¹⁰⁴ Additionally, she argued that it was unclear whether the government's use of the material-witness statute was legal or not, given al-Kidd's mistreatment while detained.¹⁰⁵

⁹⁹ *Id.* at 2086-87. Justice Kennedy explained what would happen if a government official had to abide by the strictest standard of law in any one jurisdiction. *Id.* at 2087. A lower court's opinion could then have the effect of instituting "rules with . . . national significance," thoroughly circumventing the traditional process of appellate review. *Id.*

¹⁰⁰ *Id.*; see *supra* notes 87-88 and accompanying text.

¹⁰¹ *Al-Kidd*, 131 S. Ct. at 2087 (Ginsburg, J., concurring).

¹⁰² *Id.*

¹⁰³ *Id.* Justice Ginsburg disagreed with the majority's ruling on the merits of the first prong of the two-prong qualified immunity test. *Id.* She argued that the *Pearson* principle applied and that the Court should not decide "novel and trying" issues "that will 'have no effect on the [case before them].'" *Id.* (quoting *Pearson v. Callahan*, 555 U.S. 223, 236-37 (2009)); see *supra* note 72.

¹⁰⁴ *Al-Kidd*, 131 S. Ct. at 2088; see *supra* note 3. Justice Ginsburg also noted that the affidavit lacked elements of particularity, did not state any knowledge that al-Kidd supposedly possessed, and did not show how that knowledge would help in the investigation of al-Hussayen. *Al-Kidd*, 131 S. Ct. at 2088.

¹⁰⁵ *Al-Kidd*, 131 S. Ct. at 2089. Justice Ginsburg specifically mentioned the "harsh custodial conditions to which al-Kidd was subjected." *Id.* Al-Kidd was "kept in high-security cells lit 24 hours a day, strip-searched and subjected to body-cavity inspections on more than one occasion, and handcuffed and shackled about his wrists, legs, and waist." *Id.* (citations omitted). Justice Ginsburg suggested the possibility that even if

D. Justice Sotomayor's Concurring Opinion

Justice Sotomayor, with Justices Ginsburg and Breyer joining, concurred in the judgment.¹⁰⁶ Justice Sotomayor agreed with the majority's conclusion that Ashcroft did not violate a "clearly established law" and was entitled to qualified immunity.¹⁰⁷ Justice Sotomayor, however, like Justice Ginsburg, disagreed with the majority's undertaking of a "difficult and novel" constitutional interpretation that had "no effect on the outcome of the case."¹⁰⁸ In particular, she disagreed with the majority's determination that pretextual use of a material-witness arrest warrant was not a Fourth Amendment violation.¹⁰⁹ Justice Sotomayor argued that none of the Court's prior decisions espousing the objective inquiry principle addressed the detention of an individual where there was no probable cause to believe he had committed a crime.¹¹⁰

Justice Sotomayor, like Justice Ginsburg, also doubted the validity of the arrest warrant affidavit.¹¹¹ She argued that the government probably could have secured al-Kidd's presence with a simple subpoena or his testimony through a deposition.¹¹² Justice Sotomayor concluded that one ought not to interpret the Court's majority opinion as an endorsement of the government's actions towards al-Kidd.¹¹³

IV. DISCUSSION

The Supreme Court's opinion in *Ashcroft v. al-Kidd* answered the important question of whether a former upper-level

the classification of al-Kidd as a material witness had initially been proper, there might not be a basis for his subsequent, post-arrest mistreatment. *Id.*

¹⁰⁶ *Id.* (Sotomayor, J., concurring).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 2089-90 (citations omitted); see *supra* notes 72, 103 and accompanying text.

¹⁰⁹ *Al-Kidd*, 131 S. Ct. at 2090. Justice Sotomayor believed that this issue was one that was "closer . . . than the majority's opinion suggest[ed]." *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* For example, the Government failed to disclose that they had no intention of using al-Kidd as a witness at al-Hussayen's trial. *Id.*

¹¹² *Id.* (quoting 18 U.S.C. § 3144 (2006)); see *supra* notes 23-25.

¹¹³ *Al-Kidd*, 131 S. Ct. at 2090.

government official would be held liable for an alleged violation of an individual's constitutional rights.¹¹⁴ The Court applied the two-prong qualified immunity analysis to determine whether Ashcroft was entitled to the defense.¹¹⁵ The Court could have examined only the second prong and found that Ashcroft's conduct did not violate a "clearly established" legal right.¹¹⁶ The Court's majority, however, also addressed the constitutionality of the government's use of the federal material-witness warrant and determined that the arrest was not a violation of al-Kidd's Fourth Amendment rights.¹¹⁷

Justices Ginsburg, Breyer, and Sotomayor argued that the Court should not have determined whether the pretextual use of the material-witness warrant was constitutional. They argued that the Court was overreaching to address an unnecessary constitutional issue.¹¹⁸ Al-Kidd had not specifically argued that the validly obtained material-witness warrant was unconstitutional; therefore, the majority's ruling assumed that such warrant was constitutional.¹¹⁹ The concurring Justices disagreed with this assumption and the majority's analysis of the issue.¹²⁰

Should the issue come before the Court in the future, the concurring Justices' opinions have cast doubt on the constitutionality of these warrants.¹²¹ Justices Ginsburg and Sotomayor even specifically suggested that the manner in which the government used the warrants might be unconstitutional.¹²² Although the Justices all agreed that a simple qualified immunity inquiry exonerated Ashcroft, the Court's majority assumed an answer to the important question regarding the constitutionality

¹¹⁴ See *supra* notes 68-69 and accompanying text.

¹¹⁵ See *supra* notes 72-73, 84 and accompanying text.

¹¹⁶ See *supra* note 89 and accompanying text.

¹¹⁷ See *supra* note 69 and accompanying text.

¹¹⁸ See *supra* notes 103, 109 and accompanying text.

¹¹⁹ See *supra* notes 94-95 and accompanying text.

¹²⁰ See *supra* notes 94-95, 103, 109 and accompanying text.

¹²¹ See *supra* notes 97, 103-05, 111 and accompanying text.

¹²² See *supra* notes 104, 111 and accompanying text.

of the material-witness statute itself.¹²³ For the concurring Justices, this issue remains unresolved.¹²⁴

CONCLUSION

In *Ashcroft v. al-Kidd*, the Supreme Court applied a two-prong analysis to determine if Ashcroft was entitled to a qualified immunity defense. Applying the first prong of the test, the Court reaffirmed its use of an objective approach when examining whether a search or seizure was reasonable under the Fourth Amendment. The Court refused to treat al-Kidd's arrest under the material-witness statute as an exception to this principle. The Court found that the judicially-issued arrest warrant was based on individualized suspicion and did not necessitate a subjective inquiry into any alleged motives of government officials. The arrest warrant was objectively reasonable; and thus, Ashcroft did not violate a constitutional right. The Court also applied the second prong of the qualified immunity test and unanimously agreed that even if Ashcroft had violated a constitutional right, that right was not clearly established.

Although the Court could have rendered a judgment based on the second prong alone, the majority nonetheless analyzed the first prong in an attempt to correct the Ninth Circuit's erroneous interpretation of two previous Supreme Court rulings. The Court held that an individual could not challenge the pretextual use of a material-witness warrant when the government validly obtained that warrant. While the Court's opinion answered a constitutional challenge to the alleged motivations behind the warrant, it assumed there was no constitutional problem with a material-witness arrest warrant itself. The concurring Justices challenged this assumption, and their opinions cast a shadow of doubt on the constitutionality of detaining individuals under this statute in the future.

Charles E. Cowan

¹²³ See *supra* notes 92, 95, 103-04, 108-09 and accompanying text.

¹²⁴ See *supra* notes 97, 105, 109 and accompanying text.

